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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~372~~ 91

THOMAS C. CHAPPELL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED FEBRUARY 27, 1892.

(14,983.)

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a UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

At a district court of the United States in and for the Maryland district, begun and held at the court-house, in the city of Baltimore, on the first Tuesday of December, being the first day of the same month, in the year of our Lord one thousand eight hundred and ninety-one—present, the Honorable Thomas J. Morris, judge of the Maryland district; John T. Ensor, Esquire, attorney; William F. Airey, Esquire, marshal; James W. Chew, clerk—among other were the following proceedings, to wit:

In the Matter of the Petition of William Windom, Secretary of the Treasury of the United States, wherein THE UNITED STATES is Plaintiff,

vs.

THOMAS C. CHAPPELL, Defendant.

1 *Petition of William Windom, Secretary of the Treasury of the United States, and Order of Court.*

Filed March 21, 1890.

In the District Court of the United States for the District of Maryland, September Term, 1889.

In the Matter of the Condemnation of an Easement Across a Strip of Land Situated at Hawkins Point, Anne Arundel County, State of Maryland, for the Use of the Light-house Board of the United States.

To the Honorable Thomas J. Morris, judge of the said court:

The petition of William Windom, Secretary of the Treasury of the United States and *ex officio* president of the Light-house Board of the United States, respectfully represents:

1. That under the provisions of section 4658 of the Revised Statutes of the United States the Light-house Board of the United States is required to perform all administrative duties relating to the construction, illumination, inspection, and superintendence of light-houses, light-vessels, beacons, buoys, and sea-marks and their appendages, and that the Congress of the United States appropriates annually a sum of money for repairs and incidental expenses of light-houses, and that said appropriation is available for the
2 payment for the easement over the strip of fast land hereinafter described.

2. That heretofore the United States has constructed and had in operation as range lights of the Brewerton channel of the Patapsco river, situated within the limits of the State of Maryland, two beacon lights, known as Hawkins Point and Leading Point lights; that between said lights there is a strip of fast land over which it is necessary to transmit without obstruction, both day and night, rays of

light from Leading Point light, so that navigators of Brewerton channel may be able to see at night the Leading Point light, and in the daytime a ball elevated over the said light-house.

3. That in the judgment of your petitioner it is necessary and advantageous to the Government of the United States to acquire an easement over said strip of fast land, by condemnation under judicial proceedings, for the purpose aforesaid of transmitting rays of light without obstruction, both in the day and night, from Leading Point light to Hawkins Point light.

4. That the metes and bounds of said strip of fast land over which the said easement is sought to be condemned by judicial proceedings *is* as follows: "An easement and perpetual guarantee against obstruction of the Brewerton channel, Patapsco river, range lights, known as Leading Point and Hawkins Point lights, across a strip of fast land, a part of Hawkins point proper, the said strip of land to be thirty feet on either side of the line of the said range
3 lights and to extend from the ordinary high-water mark on the east side of Thomas cove, Patapsco river, along said range and across Hawkins point proper, and to the ordinary high-water mark of the Patapsco river west of Hawkins Point light-house, being a total length of 113 perches, or 1,864.5 feet, more or less. The direction of centre line of said strip of land from Hawkins Point light to Leading Point light, according to the Coast Survey chart of 1886, is north 64 degrees 30 minutes west."

5. That the owner of the fee-simple title of said strip of fast land is Thomas C. Chappell, a resident and citizen of Baltimore county, State of Maryland.

To the end, therefore, that the court will take such order in the premises as shall result in the acquisition for the United States of the easement aforesaid in said strip of fast land by condemnation in accordance with the act of Congress in such case made and provided.

And as in duty, &c.

THOMAS G. HAYES,

United States District Attorney, who Appears for the Secretary of the Treasury, the Petitioner, by Direction of the Attorney General of the United States.

The court having read and considered the aforegoing petition of the Honorable William Windom, the Secretary of the Treas-
4 ury of the United States and *ex officio* president of the Light-house Board of the United States, it is, this the twenty-first day of March, A. D. 1890, ordered by the court that a copy of this petition be served on Thomas C. Chappell, [illegible] as owner of the land in question, and that he show cause on or before the tenth day of April, A. D. 1890, why the prayer of the petitioner should not be granted, and why the court should not direct the condemnation of the easement mentioned in said petition and proceed to have the damages which the owner of said land will sustain by the acquiring of said easement by the United States valued and ascertained by a jury, provided a copy of this petition and order be

served on said Thomas C. Chappell on or before the 24th day of March, A. D. 1890.

THOS. J. MORRIS, *Judge.*

The aforegoing petition and order of court is thus endorsed, to wit:

"Copy of within petition and order of court served on Thos. C. Chappell M'ch 24, 1890, at 1 o'clock p. m., in presence of W. M. Isaac. Geo. H. Cairnes, U. S. marshal."

5 *Exception to Order of Court.*

Filed April 9, 1890.

In the District Court of the United States for the District of Maryland, March Term, 1890.

In the Matter of the Condemnation of an Easement Across a Strip of Land Situated at Hawkins Point, Anne Arundel County, State of Maryland, for the Use of the Light-house Board of the United States.

To the Honorable Thomas J. Morris, judge of said court:

And now comes said Thomas C. Chappell *in propria persona*, who, saving and reserving all advantages and exceptions whatsoever, prays leave to except to the order of this honorable court passed the twenty-first day of March, A. D. 1890, in the matter aforesaid.

April 8, A. D. 1890.

THOMAS C. CHAPPELL.

Demurrer.

Filed April 9th, 1890.

In the District Court of the United States for the District of Maryland, March Term, 1890.

In the Matter of the Condemnation of an Easement Across a Strip of Land Situated at Hawkins Point, Anne Arundel County, State of Maryland, for the Use of the Light-house Board of the United States.

6 To the Honorable Thomas J. Morris, judge of said court:

And the said Thomas C. Chappell, defendant *in propria persona*, saving and reserving all advantages and exceptions whatsoever, comes and defends the wrong and injury when, &c., and says that the said declaration and petition and the matters therein contained, in manner and form as the same are above and therein stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action against the defendant, and that he, the said defendant, is not bound by law to answer the same; and this he is ready to verify.

Wherefore, by reason of the insufficiency of the said declaration and petition in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against him.

And the said Thomas C. Chappell, defendant, according to the form of the statute in such cases made and provided, states and shows to the court here the following cause of demurrer to the said declaration and petition—that is to say, that there is no authority of law for this proceeding, and also that it is not shown that the Congress of the United States has appropriated or will appropriate more than five thousand dollars to pay for said easement, and that said easement is of a value greatly exceeding five thousand dollars, and whether Congress annually or has ever appropriated a sum of money for repairs and incidental expenses of the light-house
7 sufficient to pay for said easement which is applicable therefor, and also that there is no party plaintiff made in said declaration and petition, and also that the laws of the State of Maryland require said proceeding, if the right to any such has accrued, to be conducted in the circuit court for the county where said land is situated, and by the laws of the United States the said laws of the State form the rule of decision in the courts of the United States in this matter, and also that the United States of America has passed no general law or special law authorizing the petitioner or the Attorney General of the said United States, nor any other person whatsoever, to institute this proceeding, and said proceeding is instituted *ultra vires*, and the said United States cannot be made a party to said suit except by the direction and with the consent of the law-making power, and said power has neither directed the same nor consented thereto, and also that the *locus in quo* is not sufficiently described in any count or counts of said declaration and petition, and also that the said declaration and petition *is* different in substance from the usual approved and established precedents in like cases, and also that the said declaration and petition is in other respects uncertain, informal, and insufficient, &c.

THOMAS C. CHAPPELL,
Defendant and Solicitor for Himself.

UNITED STATES OF AMERICA, }
District of Maryland, } *ss:*

8 Thomas C. Chappell, being duly sworn, deposes and says that the foregoing demurrer is not interposed to delay the cause in any proceeding therein and is true to the best of his knowledge, information, and belief.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

Endorsed: "Service copy admitted April 9th, 1890. Thomas G. Hayes, U. S. att'y."

Notice to United States District Attorney.

Filed April 9, 1890.

In the District Court of the United States for the District of Maryland, March Term, 1890.

In the Matter of the Condemnation of an Easement Across a Strip of Land Situated at Hawkins Point, Anne Arundel County, State of Maryland, for the Use of the Light-house Board of the United States.

Please to take notice that you are hereby required to join in the demurrer filed in this cause, with a copy whereof you are hereby served, in fifteen days after service of a copy thereof and this notice, or judgment.

Dated April 9th, 1890.

Yours, &c., THOMAS C. CHAPPELL,
Defendant and Solicitor for Himself.

9 To Thomas G. Hayes, Esq., United States district attorney, who appears for the Secretary of the Treasury, the petitioner, by direction of the Attorney General of the United States.

Endorsed: "Service — copy admitted 9 day April, 1890. Thomas G. Hayes, U. S. att'y."

Order of Court Overruling Demurrer and for Procedure of Condemnation.

Filed May 12, 1890.

The matter of the petition of the Secretary of the Treasury of the United States and *ex officio* president of the Light-house Board of the United States, filed March 21st, 1890, for condemnation — an easement over certain lands of Thomas C. Chappell, situated at Hawkins point, Anne Arundel county, Maryland, for the use of the Light-house Board of the United States, coming on to be heard this 12th day of May, 1890, after due notice to said Chappell; and the court after having heard argument by Mr. Thomas G. Hayes, the district attorney of the U. S. for this district, on behalf of the petitioner, and by Mr. Thomas C. Chappell, in his own behalf,

10 and it appearing to the court that the Honorable William Windom, Secretary of the Treasury of the United States and *ex officio* president of the Light-house Board of the United States, has been authorized to acquire the easement in question for the public use of the said Light-house Board; and it further appearing to the court that, being thus authorized, the said Secretary of the Treasury is of the opinion that it is necessary and advantageous to the United States to acquire for the United States by condemnation

under judicial process the easement in question, which is described by metes and bounds in the said petition, and that the said Secretary of the Treasury has made application to the Attorney General of the United States to cause proceedings to be commenced for the condemnation of said easement; and it appearing that the demurrer filed by said Chappell should be overruled, and the court being of opinion that condemnation of the said easement in the land of said Chappell mentioned in said petition ought to be had by the United States, and that the question of the damage which said Chappell will sustain thereby should be submitted to a jury, it is thereupon ordered, adjudged, and decreed, this 12th day of May, 1890, that upon a day to be fixed by this court, upon notice to said parties, a jury of this court be impaneled, who shall be duly sworn to justly and impartially value and assess the damages which the said Chappell, as the owner of said land, will sustain by the acquisition by the United States of the easement aforesaid, and that the said jury be impaneled from twenty jurors regularly drawn to serve in this court, from whom each party may strike four jurors;
11 or, if either party refuse to so strike, the court shall strike for him, and the remaining twelve jurors shall be the said jury of inquest to assess said damages.

And the said proceeding shall be in such form as that the United States of America and the said Thomas C. Chappell shall be the parties thereto.

THOMAS J. MORRIS,
District Judge.

Exception to Ruling of Court.

Filed May 12, 1890.

In the District Court of the United States for the District of Maryland.

In the Matter of the Condemnation of an Easement Across a Strip of Land Situated at Hawkins Point, Anne Arundel County, State of Maryland, for the Use of the Light-house Board of the United States.

Thomas C. Chappell, the defendant, prays leave to except to the ruling of the court that he is properly before the court in this matter, and that the court will sign this his bill of exception.

THOMAS C. CHAPPELL,
Defendant and Solicitor in Person.

Exception noted.

THOS. J. MORRIS, *Judge.*

12 *Petition for Writ of Error to Circuit Court.*

Filed May 15, 1890.

(Inserted in record at request of defendant.)

In the United States Circuit Court for the District of Maryland.

In the Matter of the Condemnation of an Easement Across a Strip of Land Situated at Hawkins Point, Anne Arundel County, State of Maryland, for the Use of the Light-house Board of the United States.

To the honorable judge of said court:

The petition of Thomas C. Chappell, citizen of the State of Maryland, of the United States, respectfully shows that on the 21st day of March, 1890, Wm. Windom, Secretary of the — United States and *ex officio* president of the Light-house Board of the United States of America, filed a bill in the district court of the United States for the district of Maryland against your petitioner for the condemnation of an easement in land, the fee-simple title to which is now in your petitioner; that on the 21st day of March, 1890, the judge of the said district court entered an order therein against your petitioner to show cause why said condemnation should not be had;

13 that no original writ and no writ of *capias ad respondendum* or writ of summons was issued therein for your petitioner, the defendant, and no printed notice of the substance and object of said petition has been published by the clerk of said court in any newspaper printed in the city of Baltimore or in any newspaper printed or published in the county where the land lies; that on the 8th day of April, 1890, your petitioner, reserving every manner of advantage and exception whatsoever, took an exception to the said order of the said court; that on the 9th day of April, 1890, your petitioner, reserving every manner of advantage and exception whatsoever, filed a demurrer to said petition of said Windom; that on Monday, 12th day of May, 1890, the cause coming to be heard, the said Thomas C. Chappell, your petitioner, came into court to object to the process, and the court thereupon overruled said objection, and your petitioner thereupon took an exception to said ruling, and thereupon, the cause being heard upon the demurrer of your petitioner, the said demurrer was overruled and judgment rendered thereupon against your petitioner. Wherefore, that the said judgment may be examined and reversed or affirmed in the circuit court of the United States for the district of Maryland upon a writ of error, your petitioner prays that the said writ of error may issue, together with the citation, in accordance with the laws of the United States in such cases made and provided.

And your petitioner will ever pray, and, &c.

THOMAS C. CHAPPELL,
Defendant & Solicitor in Person.

14 STATE OF MARYLAND, } ss:
City of Baltimore, }

Thomas C. Chappell, defendant and solicitor in person, being duly sworn, says that the matters and things stated in the aforegoing petition are true, and that the said appeal is not taken for the purpose of delay.

This 14th day of May, 1890.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

And thereafter, to wit, on the 28th day of October, 1890, after due notice to the parties hereto, a jury was duly empanelled in said cause, in accordance with the order of court passed therein, and sworn "to truly and impartially value and assess the damages for the condemnation of the said easement over the land at Hawkins point, in said petition mentioned, and a true inquisition make according to the evidence," and evidence on behalf of the United States and on behalf of the said Chappell having been heard by said jury, thereafter, to wit, on the 3rd day of November, 1890, the court instructed said jury as follows:

Instructions of the Court to the Jury.

Filed November 3, 1890.

Instruction to the Jury.

It has been explained to you in the opening statements and during the progress of this proceeding that the purpose of this condemnation is to acquire for the United States the right to have for the use of navigators of the Brewerton channel an unobstructed
15 view of the light-house on Leading point, so that when in that channel navigators in the night may see the beacon light on Leading Point house, and in the daytime they may see a ball elevated over that light-house. To secure this the United States requires that there shall be kept free from obstructions high enough to interfere a strip of land 60 feet wide, extending across the land at Hawkins point belonging to Mr. Chappell, in the direct line between Hawkins Point light and Leading Point light. Subject to this restriction against placing such obstructions on this 60-feet strip in the range of said lights, the owner of the land will continue at liberty to make any use of it he may see fit.

In seeking to acquire this easement or privilege the United States is acting rightfully and for the good of the whole community, and is not to be treated as a wrong-doer, and, on the other hand, Mr. Chappell is not required to make any sacrifice of his individual rights without just compensation, and he is entitled to have awarded to him fair and full compensation in money for whatever he may be deprived of and for any damage which will be inflicted upon his property which can be fairly estimated in money.

Where the whole of an owner's property is actually taken for the use of the Government, the just compensation to which the owner is entitled is the fair market value of the property at the time of the condemnation, and the market value is that price which the property will bring if offered for sale by an owner who desires to sell it,
but is under no compulsion to sell, and is purchased by one
16 who is under no compulsion or necessity to buy it, and the
safest guides in discovering the present market price of a property are actual transactions, sales and purchases, of similar property, so far as they are proved to the satisfaction of the jury; and it is also to be ascertained by the opinions of witnesses who, by reason of their knowledge of such actual transactions and of the capabilities of the property and of all the uses to which it may be applied or is adapted and the present demand for such property, are able to form an intelligent opinion of what is the fair market price which the property would bring if offered for sale.

But in this case there is no portion of Mr. Chappell's property actually taken from him by these proceedings. What is about to be done is to restrict the use which he may make of a portion of it, and what you are to estimate is the extent in money to which, as the owner of the strip of land on which he will not be permitted to erect obstructions and as the owner of the adjacent lands, he will suffer damage—that is to say, how much less will Mr. Chappell's property be worth in the market for all the purposes for which it might reasonably be expected it might be used if the Government puts upon it the proposed restriction than it would have been worth if the United States imposed no such easement upon it. It is the damage to the whole property directly resulting from the restriction which you are to consider and estimate.

You are to bear in mind, however, that it is the damage
17 inflicted upon the present market value—that is to say, how
much would it lessen the present market price. It is not what would be the detriment if the property had been improved out to deep water by any scheme of improvement which Mr. Chappell or others may think likely to be profitable, because that is too speculative and too uncertain to found any judgment upon. The only consideration you are to give to the possibility or probability of such improvements is to ascertain how far the expectation that they might be advantageously made does now affect the price which intending buyers would give for the property at this time, and how far the proposed restriction would affect that value.

It is conceded that, so far as the land may be used for agricultural purposes, the proposed restriction would be of very slight detriment, but it is contended that its capacities for manufacturing and building purposes give the whole property a present value which would be diminished by the proposed restriction on the use of the 60-feet strip.

It is for you to determine whether or not this is so, and, if so, to what amount in money.

In forming this estimate much is necessarily left to your good sense and practical judgment in business affairs. Testimony has

been submitted to you in which the witnesses have given to you widely different opinions. You should give the weight to these opinions which your best judgment leads you to think should be accorded to them.

The value of the land, since it is not in demand for immediate use, is somewhat speculative, as is the value of all land near
18 a city which is awaiting the development of enterprises which are expected to bring it into use, and the detriment inflicted is also somewhat contingent and speculative; but whatever you are satisfied that detriment actually amounts to in money, at this time, you should award to Mr. Chappell. He is entitled to just compensation for whatever loss he suffers, as nearly as you can ascertain it.

You are to deal fairly and impartially between the United States, on the one hand, and Mr. Chappell on the other—just as you would between any two parties in a civil suit.

The COURT: The plaintiff's first prayer, which describes exactly the strip of land and the character of the easement, is granted. The plaintiff's second prayer is, I think, calculated to confuse the jury.

Mr. ENSOR: I do not see any necessity for the second prayer. In view of the instructions which your honor has given (which are so clear and able, in my opinion), I withdraw that prayer also. Your honor's instruction covers the ground of that prayer fully. In the last prayer I have struck out the word "uses" and inserted the word "values."

The COURT: I do not think it is well to grant that prayer.

Mr. ENSOR: I think your honor's instruction covers fully the whole case.

Mr. CARTER: The only part, your honor, that I would like to have added—I wouldn't subtract an iota from what your honor has said; I think your instruction covers fairly the whole
19 question—the only part that I would like have added—I do not care whether it is made verbally or put in writing—is in connection with what your honor has so often said during the trial, that we have, under the act of Maryland of 1862, independently of the common-law right, the right to wharf out or build out to the port warden's line, provided always the building out of structures does not interfere with the light or with navigation. That question arises in this case as to the value of our property down there.

The COURT: Gentlemen of the jury, in considering the testimony before you as to the uses of this land, it is proper that you should know that the owner of this land has a right to wharf out or fill out into the stream, under the laws of Maryland, provided he does not interfere with navigation or with the light-houses already established by the U. S.; every land-owner on the water has that right; the object being to encourage land-owners to wharf their property out to deep water in order to make it available for commerce in connection with navigation.

And on the same day, to wit, November 3rd, 1890, said jury returned the following inquisition and award, to wit:

Inquisition and Award.

Filed November 3rd, 1890.

UNITED STATES OF AMERICA, *District of Maryland*, } *To wit:*

In the District Court of the United States in and for the District of Maryland.

20 This inquisition taken this the third day of November, A. D., 1890, on the application by petition of William C. Windom, Secretary of the Treasury of the United States and in a cause pending in the district court of the United States for the district of Maryland, wherein The United States is plaintiff and Thomas C. Chappell is defendant, under the provisions of the act of Congress of August 1, 1888, chapter 728, to value a certain easement, hereinafter more fully set forth and described, sought to be had and condemned by the United States for the purpose of transmitting, both in the daytime and at night, rays of light along a certain range hereinafter fully described, without obstruction or any interference whatsoever, from Leading Point light station through Hawkins Point light station and into and along Brewerton channel, in the Patapsco river, and over and across a portion of the land owned by the said Thomas C. Chappell, situated at Hawkins point, in Anne Arundel county, State of Maryland, and in the district aforesaid, and herein fully described by metes and bounds.

That the metes and bounds of said strip of fast land over which the value of said easement is assessed and the nature and character of said easement, is as follows: An easement and perpetual guarantee against obstruction of the Brewerton channel Patapsco river range lights, known as Leading Point and Hawkins Point lights, across a strip of fast land, a part of Hawkins point proper, the said strip of land to be thirty feet on either side of the line of the said range lights and to extend from the ordinary high-water
21 mark on the east side of Thomas cove, Patapsco river, along said range and across Hawkins point proper and to the ordinary high-water mark of the Patapsco river west of Hawkins Point light-house, being a total length of 113 perches or 1,864.5 feet, more or less, the direction of centre line of said strip of land from Hawkins Point light to Leading Point light according to the Coast Survey chart of 1886, is north 64 degrees, 30 minutes west.

Witnesseth that we, the jurors whose names are hereto subscribed and seals affixed, being duly empanelled and each of us before acting as juror, having been sworn and charged well and truly and impartially to value and assess the damages in the matter of the petition of William C. Windom, Secretary of the Treasury of the United States, for the condemnation of an easement over the land at Hawkins point, in said petition named, wherein The United States is plaintiff and Thomas C. Chappell is defendant, and a true inquisition make, according to the evidence, do find and assess the

said damages at the sum of thirty-five hundred dollars, for the enjoyment in perpetuity by the United States of said easement over said strip of land for the transmission of rays of light as aforesaid and an unobstructed view as aforesaid.

In witness whereof, we have hereto set our hands and seals the day and year above written.

LEWIS R. KEIZER.	[SEAL.]
ROBERT S. RYAN.	[SEAL.]
ROBERT E. BRADLEY.	[SEAL.]
GEO. LYCETT.	[SEAL.]
JAMES DIGGS.	[SEAL.]
LEVI ARNETT.	[SEAL.]
WILLIAM H. BUSEY.	[SEAL.]
JOHN W. DIGGS.	[SEAL.]
W. S. BROWN.	[SEAL.]
WILLIAM MILLER.	[SEAL.]
CHAS. R. BURGESS.	[SEAL.]
WM. C. BURGESS.	[SEAL.]

22 *Plea in Abatement to the Jurisdiction of the Court.*

Filed November 10, 1890.

In the District Court of the United States for the District of Maryland.

THE UNITED STATES
vs.
THOMAS C. CHAPPELL.

And the said Thomas C. Chappell in his own person comes and defends the wrong and injury when, &c., and says that the court here ought not to take cognizance of or sustain the action aforesaid, because he says that the cause of action aforesaid, if any accrued to the said plaintiff, accrued to him at Annapolis, within the jurisdiction of the circuit court for Anne Arundel county, State of Maryland, and not within the jurisdiction of this court; and this he is ready to verify.

Wherefore he prays judgment if the court here will take further cognizance of or sustain the action aforesaid, &c.

THOMAS C. CHAPPELL.

DISTRICT OF MARYLAND:

Thomas C. Chappell, the above-named defendant, being duly sworn, says that the above plea is true in substance and matter of fact.

THOMAS C. CHAPPELL.

Sworn to before me this 10th day of November, 1890.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

23 *Exceptions to Inquisition.*

Filed November 17, 1890.

In the District Court of the United States for the District of Maryland.

THE UNITED STATES OF AMERICA
vs.
THOMAS C. CHAPPELL.

And now comes Thomas C. Chappell and makes the following exception- to the inquisition found in this cause:

1st. That the statute under which this proceeding is sought to be maintained is unconstitutional, and this court has no jurisdiction of the subject-matter of this suit.

2nd. That the law-making power of the United States has not authorized any officer to make said United States a party to this suit or proceeding, and this court has no jurisdiction of the subject-matter of this suit, there being a want of power to condemn this property described in this inquisition.

3rd. That the laws of the United States have not been complied with.

4th. That the damages allowed are inadequate.

5th. That the easement is not properly described in the inquisition.

Wherefore the said inquisition ought to be set aside and vacated.

THOMAS C. CHAPPELL.

Endorsed: "Service of copy admitted Nov. 18th, 1890. J. T. Ensor, U. S. dist. att'y."

24 *Petition and Order for Hearing of Exceptions to Inquisition.*

Filed December 9, 1890.

In the U. S. District Court for the District of Maryland.

In the Matter of the Petition of WILLIAM WINDOM, Secretary of the Treasury of the United States,
vs.
THOMAS C. CHAPPELL.

To the Honorable Thomas J. Morris, judge of said court:

The defendant in the above-entitled case having filed exceptions to the inquisition and award of the jury for the easement mentioned in said proceedings, counsel for the plaintiff respectfully requests that the said exceptions may be set for hearing at an early day.

Very respectfully,

J. T. ENSOR,
U. S. District Attorney.

Ordered, this 9th December, 1890, that the exceptions of Thomas C. Chappell in the above-entitled case be set for hearing on Thursday, December 18th inst.; copy of this order to be served today by leaving copy at defendant's place of business.

THOS. J. MORRIS, *D't Judge.*

Endorsed: "Served by leaving copy at place of business of Thos. C. Chappell, Dec. 9th, 1890. Wm. F. Airey, U. S. marshal."

25 *Order Overruling Exceptions and Confirming Award.*

Filed December 18, 1890.

In the District Court of the United States for the District of Maryland.

In the Matter of the Petition of William Windom, Secretary of the Treasury of the United States, wherein THE UNITED STATES is Plaintiff,

vs.

THOMAS C. CHAPPELL, Defendant.

The exceptions to the inquisition in the above-entitled cause standing ready for hearing and no sufficient cause in support of said exceptions having been shown, it is thereupon, this 18th day of December, 1890, by the court here ordered that the said exceptions be, and the same are hereby, overruled, and that the said inquisition and award be, and the same is hereby, confirmed.

THOS. J. MORRIS,
District Judge.

26 *Petition of Disbursing Officer and Order of Court.*

Filed December 20th, 1890.

In the District Court of the United States for the District of Maryland.

In the Matter of the Petition of WILLIAM WINDOM, Secretary of the Treasury of the United States, for the Condemnation of an Easement for Light-house Purposes over the Land of Thomas C. Chappell at Hawkins Point,

vs.

THOMAS C. CHAPPELL, Defendant.

To the Honorable Thomas J. Morris, judge of said court:

The petition of John C. Mallery, U. S. A., engineer of the fifth light-house district, at Baltimore, Maryland, respectfully shows:

First. That he is disbursing officer, under the Light-house Board of the Treasury of the United States, at Baltimore.

Second. That the honorable Secretary of the Treasury of the United States has placed in his hands the sum of three thousand

five hundred dollars with which to pay the amount of the award to Thomas C. Chappell for the easement acquired by the United States over his land at Hawkins point and particularly mentioned in the proceedings in said cause.

Third. That since the inquisition and award rendered by
27 the jury for said easement he has made every reasonable effort to see Mr. Chappell for the purpose of tendering to him in person the said sum of three thousand five hundred dollars, but has not been able to see him, for the reason that he has for some time been away from the city and is now in the city of New York, as your petitioner is informed, with no definite time fixed for his return.

Your petitioner therefore prays that he may be permitted and authorized to pay said money into your honorable court for the purpose of paying the award aforesaid found by the jury for said easement mentioned in said proceedings.

J. C. MALLERY,
Capt. Eng'rs, U. S. A., Light-house Engineer, 5th Dist.

Upon the foregoing petition of John C. Mallery, captain of engineers, U. S. A., it is ordered by the court, this 20th day of December, A. D. 1890, that the defendant, Thomas C. Chappell, show cause on or before the 27th instant why the prayer of the said petition should not be granted, provided a copy of the said petition and this order be served on the defendant, Thomas C. Chappell, by leaving the same at his place of business in Baltimore city on or before the 22nd inst.

THOS. J. MORRIS,
District Judge.

Endorsed: "Served by leaving copy at place of business, 8 South St., Baltimore, Md., 1 p. m., Dec. 20, '90. Wm. F. Airey, U. S. marshal."

28 *Answer to Petition of Disbursing Officer.*

Filed December 27, 1890.

In the District Court of the United States for the District of Maryland.

In the Matter of the Petition of WILLIAM WINDOM, Secretary of the Treasury, etc.,
vs.
THOMAS C. CHAPPELL.

To the Honorable Thomas J. Morris, judge, etc.:

The defendant for cause against the passage of the order prayed for by John C. Mallery, engineer of the fifth light-house district, in his petition filed December 20th, 1890, and for answer to said petition says:

1. That he has no knowledge of the matters and things in the first and second paragraphs of said petition and cannot admit or deny them.

2. He admits he has been temporarily absent in New York, but he does not know what efforts have been made by the petitioner to find him.

3. This defendant further says that he has filed in this court his petition for a writ of error to the circuit court of the United States for this district in order that the rulings and judgments of the said district court in the course of the proceedings in the above-entitled matter may be reviewed, and that he is advised that he is entitled to have said writ of error allowed, and he means to prosecute the same in the said circuit court, and in case the judgment of
29 the said circuit court should be against him in the premises he means still further to sue out and prosecute a writ of error therefrom to the Supreme Court of the United States, and he therefore is advised and charges that the pendency of said proceedings on said petition for writ of error is a sufficient cause against the grant of the prayer of said petition of said John C. Mallery, and he therefore prays that said petition may be hence dismissed with costs.

And, as in duty, etc.

BERNARD CARTER,
Att'y for D'f'd't.

P. B.

THOMAS C. CHAPPELL, *Defendant.*

Endorsed: "Service of copy admitted this 27th day of December, 1890. J. T. Ensor, U. S. dist. att'y."

PETITION FOR WRIT OF ERROR TO CIRCUIT COURT AND ALLOWANCE THEREOF.

Petition Filed December 27th, 1890.

Order allowing writ of error filed February 24, 1891.

In the District Court of the United States for the District of Maryland.

In the Matter of the Petition of WILLIAM WINDOM, Secretary of the Treasury of the United States, etc.,
vs.
THOMAS C. CHAPPELL.

30 To the honorable the judge:

The petition of the defendant in the above-entitled case respectfully represents to your honor:

1. That on the twenty-first day of March, 1890, the Hon. William Windom, Secretary of the Treasury, filed his petition in the above-entitled matter for the condemnation of the easement over the land

of the said defendant therein mentioned, and on the same day an order was passed by the court requiring the defendant to show cause why said petition should not be granted; and thereafter certain exceptions were filed by the defendant to said proceedings, and thereafter a demurrer was also filed, which said exceptions and demurrer having been by said court overruled, an inquisition was taken and an award of damages made; to which inquisition and award the defendant filed his exceptions and a plea to the jurisdiction of said court; and thereupon the said court did, on the 18th day of December, 1890, by its order of that date, overrule said exceptions and confirm said award and inquisition.

And the defendant, in order that he may have said rulings, judgments, and orders reviewed and examined by the circuit court of the United States for the Maryland district, and either reversed or approved, now prays for the allowance of a writ of error and such other process as may cause the said rulings, orders, and judgments to be corrected.

And, as in duty, etc.

BERNARD CARTER,
Att'y for D'f'd't.

P. B.

THOMAS C. CHAPPELL, *Defendant.*

31 Let the writ of error issue as prayed, and as the appeal is not to operate as a supersedeas and as it appears from the affidavit of Capt. Mallery that Mr. Chappell has been paid the amount of the award, the bond being only for costs, the penalty is hereby fixed at three hundred dollars.

THOS. J. MORRIS, *Judge.*

Agreement and Order of Court Amending Inquisition as to Height of Leading Point Light.

Filed February 12, 1891.

In the District Court of the United States for the Maryland District.

WILLIAM C. WINDOM, Secretary of the Treasury of the United States, &c.,
versus
THOMAS C. CHAPPELL.

In this case it is hereby agreed that the award of damages made by the jury, as contained in their inquisition filed in said case, was made in reference to the present height of the Leading Point light, the focal plane of which light was shown in evidence at the trial of said case to be, and it is hereby agreed is, seventy (70) feet above mean low water of the Patapsco river, and as the said inquisition does not state the said present height of said light and it is for the interest of all parties that the same should appear as a matter of

record, it is hereby agreed that the said inquisition shall be
32 taken and considered as if it stated on its face that the present height of said Leading Point light was as it is herein agreed to be.

BERNARD CARTER,
Att'y for Defendant.

THOS. C. CHAPPELL.

JOHN T. ENSOR,
U. S. Dist. Att'y.

Witness:
BERNARD CARTER.

In the District Court of the United States for the Maryland District.

Upon the foregoing agreement of counsel, it is hereby ordered by the court that the inquisition be, and the same is hereby, considered as so amended as to state that the present height of the focal plane of the Leading Point light mentioned in the said inquisition is seventy (70) feet above mean low water of the Patapsco river.

THOS. J. MORRIS, *Judge.*

33 *Affidavit of John C. Mallery, Captain of Engineers, U. S. A., as to Payment of Award.*

Filed February 24, 1891.

In the District Court of the United States for the District of Maryland.

In the Matter of the Petition of WILLIAM WINDOM, Secretary of the Treasury of the United States, for the Condemnation of an Easement for Light-house Purposes over the Land of Thomas C. Chappell, at Hawkins Point,
vs.
THOMAS C. CHAPPELL, Defendant.

To the Honorable Thomas J. Morris, judge of said court:

John C. Mallery, U. S. A., engineer of Light-house Board and disbursing officer at Baltimore, Maryland, respectfully invites your honor's attention to the fact that on the 31st day of December, A. D. 1890, he visited Thomas C. Chappell and personally tendered to him the sum of $3,500.00, lawful money of the United States, in payment of the award for the easement mentioned in said proceedings; that Mr. Chappell then declined to take said money, but said at the time that he would not refuse or accept the same until after he had consulted his counsel, and that he would let me know in a few days whether he would accept the money.

I waited for his reply a few days, and not having heard from him made inquiry as to his whereabouts and was informed that he was in New York city. Soon after his return, to wit, on the 16th day

of February, A. D. 1891, I went to his office and paid him
34 the sum of $3,500.00, lawful money of the United States, being the full amount of the award for the easement aforesaid mentioned in said proceedings.

J. C. MALLERY,
Captain of Engineers.

Sworn and subscribed to before me this 20th day of February, A. D. 1891.

JAS. W. CHEW,
Clerk of said Court.

Petition of District Attorney and Order of Court Thereon that Affidavit of Captain Mallery be Entered of Record.

Filed February 24, 1891.

In the District Court of the United States for the District of Maryland.

In the Matter of the Petition of WILLIAM WINDOM, Secretary of the Treasury of the United States, for the Condemnation of an Easement for Light-house Purposes over the Land of Thomas C. Chappell, at Hawkins Point,
vs.
THOMAS C. CHAPPELL, Defendant.

To the Honorable Thomas J. Morris, judge of said court:

The petition of John T. Ensor, attorney of the United States for said district, respectfully shows unto your honor that the
35 sum of $3,500.00, lawful money of the United States, awarded to Thomas C. Chappell for the easement over his land mentioned in the proceedings in this cause, has been fully paid to him, as will appear by the affidavit of John C. Mallery, U. S. A., captain of engineers and disbursing officer of the Light-house Board at Baltimore, Maryland, hereto annexed.

Your petitioner therefore moves the court to pass an order directing said affidavit to be filed in said cause, and that such other proceeding may be taken therein as to this honorable court may seem proper.

JOHN T. ENSOR,
Attorney of the United States for the District of Maryland.

Ordered this 24th day of February, 1891, upon the foregoing motion of the U. S. district attorney, that the affidavit of Capt. Mallery be entered of record as showing the payment by the United States of the amount of the award in this case.

THOS. J. MORRIS, *Judge.*

Affidavit of Thomas C. Chappell.

Filed December 15th, 1891.

In the District Court of the United States for the District of Maryland.

WILLIAM WINDOM
vs.
THOMAS C. CHAPPELL.

36 To the honorable judge of said court:

And now comes Thomas C. Chappell, one of the parties to said cause, and shows to your honor that John C. Mallory has filed an affidavit in this cause relative to the payment of ($3,500) thirty-five hundred dollars to your petitioner; that in receiving from John C. Mallory the sum of ($3,500) thirty-five hundred dollars your petitioner reserved all right of appeal or writ of error in this cause and accepted said money from said Mallory with special notice to said Mallory that the said payment of said money was in no way to effect said right of appeal or writ of error, and your petitioner receipted for the said ($3,500) thirty-five hundred dollars on account.

THOMAS C. CHAPPELL,
Party to Cause & Solicitor in Person.

Subscribed and sworn to before me this seventh day of Sept., 1891.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

37 *Petition for Writ of Error to Supreme Court, Allowance Thereof, and Assignment of Errors.*

Filed December 15, 1891.

In the District Court of the United States for the District of Maryland.

WILLIAM WINDOM, Secretary of the Treasury,
vs.
THOMAS C. CHAPPELL.

To the judge of said court:

The petition of Thomas C. Chappell shows that on 21st day of March, 1890, there was filed in this court by William Windom, Secretary of the Treasury, a petition for condemnation of an easement in land at Hawkins point, and on the same day an order of the court was made thereon that the said Chappell show cause, on or before the 10th day of April, 1890, why said condemnation should not be had, provided a copy of said petition and order be served

upon said Chappell on or before the 24th day of March, A. D. 1890.

And thereupon said Chappell (saving and reserving all manner of advantages and exceptions whatsoever) filed, on the 9th day of April, 1890, an exception to said order of the court, and subsequently filed a demurrer to said petition, with due notice to plaintiff's counsel to join in said demurrer; and, said cause coming on to be heard on the 12th day of May, 1890, this honorable
38 court overruled the said exception of said Chappell to said order and the point raised by said Chappell that he was not properly before the court; and said Chappell thereupon filed a bill of exceptions to said ruling of said court; and said demurrer thereupon coming on to be heard, without any joinder being filed by plaintiff's counsel, this honorable court overruled said demurrer; whereupon said Chappell, on the 15th day of May, 1890, filed a petition for a writ of error and applied to the court to fix the amount of bond, but the court then declined to allow said writ or to fix said bond; and thereupon, on the 3rd day of November, 1890, an inquisition was found, and on the 10th day of November, 1890, a plea to the jurisdiction of this court was filed by said Chappell, the same question having been previously raised by his exceptions and demurrer aforesaid, and on November 17th, 1890, exceptions to said inquisition were filed by said Chappell, and on the 18th day of December, 1890, said exceptions were overruled by this court, and on the 20th day of December, 1890, a petition of Disbursing Officer John C. Mallory was filed. On the 27th day of December, 1890, the answer of said Chappell, praying said petition of said Mallory be dismissed, was filed, and on the same day said Chappell filed a petition for writ of error and applied to this court to fix the amount of bond; whereupon this honorable court declined to fix any but a very large and excessive bond, if said writ of error was to act as a supersedeas, and held said application "*sub curia;*" whereupon, on the 17th day of February, 1891, an agreement correcting an omission in said inquisition was filed and an order of this court correcting
39 said omission was had, and thereupon, on the 16th day of February, 1891, John C. Mallory, disbursing officer aforesaid, tendered said Chappell the sum of $3,500.00, and thereupon said Chappell receipted for said sum as payment on account and with verbal notice that this acceptance of said sum was in no way to effect said Chappell's rights of appeal or writ of error, it being the intention of said Chappell that the United States of America may use the said easement and hold the same as security for said $3,500.00, and said Chappell use of said money, *pendente lite*, in order that the amount of bond might be small and only for costs, and upon the determination of said cause in his favor said Chappell will pay back said sum, with interest, and charge said United States of America for the use and occupation of said easement during said period; and on 24th day of February, 1891, a petition and affidavit of said Mallory as to the payment of said sum was filed, and thereupon this court allowed said writ of error to the circuit court of the United States

for Maryland, and fixed the amount of said bond at three hundred dollars, said bond not to act as a supersedeas, and thereupon your petitioner obtained said bond, but has withheld the same in order that the said writ of error might be allowed direct to the Supreme Court under the act of Congress and the joint resolution of 1891. Wherefore your petitioner, in order that said rulings, judgments, and orders may be reviewed and re-examined by the Supreme Court of the United States upon the question of jurisdiction raised in said exceptions, pleas, and demurrers and the other papers on file in this cause, and either reversed or affirmed, now prays for the allowance of a writ of error to the Supreme Court of the United States and such other process as may cause said rulings, orders, and judgments to be corrected, instead of to the circuit court of the United States for district of Maryland.

And as is duly bound, etc.

THOMAS C. CHAPPELL,
Party to Cause & Solicitor in Person.

U. S. OF AMERICA,
District of Maryland.

On this 15th day of December, 1891, personally appeared before me Thomas C. Chappell and made oath in due form of law that the within appeal is not taken for the purpose of delay.

R. LYON ROGERS,
U. S. Commissioner for Maryland.

The foregoing petition was presented and the writ of error allowed to the Supreme Court of the United States this 15th day of December, 1891.

THOS. J. MORRIS, *Judge.*

Assignment of Errors in the District Court of the United States for the District of Maryland and Prayer for Reversal.

Errors.

1st. The order of the court granting the prayer of the petition of William Windom, Secretary of the Treasury; whereas the court should have denied said prayer.

2nd. The ruling of the court in overruling the exception of Thomas C. Chappell to the order of the court passes twenty-first day of March, in the year of our Lord one thousand eight hundred and ninety; whereas the court should have sustained said exception.

3rd. The ruling of the court allowing the case to proceed to trial without a writ of summons being issued and served and without any notice by publication being given; whereas the court should have required said writ or said notice, as provided by the laws of the State of Maryland and the Constitution of the United States.

4th. The ruling of the court in overruling the demurrer of

Thomas C. Chappell; whereas the court should have sustained said demurrer.

5th. The ruling of the court in overruling the exceptions of Thomas C. Chappell to the inquisition; whereas the court should have sustained said exception.

Prayer.

And the said Thomas C. Chappell prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by the said judgment, &c.

THOMAS C. CHAPPELL,
Party to Case & Solicitor in Person.

42 *Writ of Error Bond.*

Filed December 15th, 1891.

Circuit Court of the United States for the District of Maryland.

THE UNITED STATES
vs.
THOMAS C. CHAPPELL.

Know all men by these presents that we, Thomas C. Chappell and William H. Crawford, are held — firmly bound unto the United States in the sum of ($300) three hundred dollars, to be paid to the said United States; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 15th day of April, 1891.

Whereas the above-named Thomas C. Chappell hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the district court of the United States for the district of Maryland:

Now, therefore, the condition of this obligation is such that if the above-named Thomas C. Chappell shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain
43 in full force and virtue.

THOMAS C. CHAPPELL. [SEAL.]
WM. H. CRAWFORD. [SEAL.]

Sealed and delivered in presence of—
N. B. MEDAIRY.

Endorsed: "Bond approved. Dec. 15th, 1891. Thos. J. Morris, judge."

Office Supreme Court U. S.
FILED.
DEC 2 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1895.

THOMAS C. CHAPPELL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

The petition of the said Thomas C. Chappell, plaintiff in error, shows that he filed in the district court of the United States for the district of Maryland, in this cause, on the fifteenth day of July, 1890, a petition for a writ of error; that the effect of the filing of said petition was to oust the jurisdiction of the said district court, or at least stay all proceedings therein while the petition was pending therein unheard and undetermined and not dismissed; that while the said petition was still depending in said court, unheard and undetermined and not dismissed, the defendant in error, on the twenty-eighth day of October, caused a jury to be convened or appointed herein, and other proceedings were had; whereupon the plaintiff in error filed a plea to the jurisdiction of the said district court and excepted to said jury and its findings; which exceptions said court set down for hearing without the notice to your petitioner required by the custom and usage of the practice of the State, and overruled the same without giving the plaintiff in error an opportunity to try the case *de novo*, in accordance with said practice, upon said question of jurisdiction or otherwise.

That the clerk of the said court has omitted to include in the record sent to this Court the plaintiff's writ of error filed in said district court on the fifteenth day of July aforesaid, the very paper upon which the question of jurisdiction herein largely depends, and has also interjected into the said copy of the record sent to this Court a statement regarding notice to the petitioner and evidence submitted to the jury (Record, p. 8), of which there is no proof or record in the proceedings had in the lower court, and which the record of the lower court does not warrant, and under the statute of the State the jury is required to annex all evidence submitted to the inquisition, and no evidence is so annexed, as will appear from the record in the lower court as well as from the copy sent to this Court; and your petitioner prays that any evidence so submitted be so annexed; and your petitioner herewith files a certified copy of the docket entries of the said district court, reference being had thereto, from which it will more fully appear that the said petition for writ of error was filed therein as aforesaid on the fifteenth day of July, 1890, and was unheard and undetermined at the time the citation issued in this cause upon a petition subsequently filed; and the said petitioner shows for cause for delay in filing this petition that, owing to the statements of the clerk of the lower court in December and to press of business and other litigation, he has not examined until today the said record of said district court in connection with the purported copy thereof sent to this Court, and that at the time the plaintiff in error filed his petition for writ of error to this Court in December 15, 1891, he insisted he had filed said previous petition in the district court, but the clerk said he had only filed a petition in the circuit court, and made your petitioner so believe, said clerk being the deputy clerk who prepared said record; and your petitioner further says that he presented said petition for a writ of error filed in the circuit court to the judge thereof in the

presence of the judge of the district court, on May 15, 1890, so that said court had notice thereof therein depending.

Wherefore your petitioner prays that a writ of certiorari may issue to said district court, commanding the clerk of said court to bring into this Court said record, diminished as aforesaid.

And your petitioner will ever pray, etc.

THOS. C. CHAPPELL,
Plaintiff in Error and Solicitor, in Person.

UNITED STATES OF AMERICA, *District of Maryland,* } *ss:*

I hereby certify that on this twenty-seventh day of November, eighteen hundred and ninety-five, personally appeared before me, a United States commissioner for the district of Maryland, said Thomas C. Chappell, and made oath in due form of law that the matters and things set forth in the foregoing petition are true to the best of his knowledge and belief.

[SEAL.]

R. LYON ROGERS,
U. S. Commissioner for Maryland.

THE UNITED STATES OF AMERICA, *District of Maryland,* } *To wit:*

IN CIRCUIT COURT U. S.

WILLIAM WINDOM, *Secretary Treasury U. S.*
vs.
THOMAS C. CHAPPELL.

21 March, 1890, petition for condemnation of land, Hawkins Point, filed; order of court thereon for defend't to show cause. 10 April, copy pet'n & order sent to be served. 9 April, 1890, exceptions to order of court filed; same day, demurrer to petition filed; same day, notice to U S. att'y filed. 13 May, 1890, demurrer to petition

overruled, and order of procedure for condemnation filed; same day, exceptions to ruling filed. 15 *July*, 1890, *petition for writ of error filed.* 28 Octo., 1890, jury sworn "to truly and impartially value and assess the damages for the condemnation of an easement over the land at Hawkins Point in said petition mentioned and a true inquisition make according to the evidence." 3 Nov., 1890, court's instruction filed & bailiff sworn; same day, damages assessed at $3,500. 10 Nov., 1890, plea in abatement to the jurisdiction filed. 17 Nov., 1890, exceptions to the inquisition filed. 9 Dec., 1890, order setting down exceptions for hearing on 18 Dec.; copy order served. 18 Dec., 1890, exceptions to inquisition overruled and award confirmed; order filed. 20 Dec., 1890, petition of disbursing officer of U. S. and order to show cause on 27 Dec. 1890; copy served. 27 Dec., 1890, answer of defendant to petition filed; same day, petition for writ of error filed. 12 Feb., 1891, agreement and order of court amending inquisition as to height of Leading Point light filed. 24 Feb., 1891, affid't of Capt. Mallory as to payment of amount of award filed; same day, petition of dist. att'y & order of court directing the affidavit of Capt. Mallory to be entered of record as showing payment of am't of award ($3,500) by U. S. filed. 24 Feb., 1891, writ of error granted; penalty of bond, $300. 15 Dec., 1891, affidavit of Thomas C. Chappell filed; same day, petition of Thomas C. Chappell for writ of error to Supreme Court of the United States, containing ass't of errors, filed; same day, writ of error to Supreme Court of U. S. allowed; same day, writ of error bond approved and filed. 6 January, 1892, additional assignment of errors filed, & on Feb. 10, '92, same withdrawn. 14 January, 1892, writ of error to Supreme Court of U. S. allowed and filed; same day, citation issued, ret'ble 12 Feb'y next; service of copy admitted. 11 February, 1892, record transmitted.

I, James W. Chew, clerk of the circuit court of the United States for the fourth circuit in and for the Maryland district, do hereby certify that the aforegoing is a true copy of the docket entries in the aforegoing entitled case.

I hereunto subscribe my name and affix the seal of the said circuit court this 27th day of November, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.] JAS. W. CHEW,
Clerk Cir. Ct. U. S.

[Endorsed:] William Windom, Secretary of the Treasury U. S., *vs.* Thomas C. Chappell. Copy docket entries. Costs, $1.00.

[Endorsed:] In the Supreme Court for the United States. Thomas C. Chappell, plaintiff in error, *vs.* The United States. Petition of certiorari. Mr. CLERK: Please file. Thos. C. Chappell, plaintiff in error and solicitor, in person.

[Endorsed:] Case No. 14,983. Supreme Court U. S., October term, 1895. Term No., 91. Thomas C. Chappell, pl'ff in error, *vs.* The United States. Petition for writ of certiorari and suggestion of diminution of record. Filed Dec. 2, 1895.

160 U.S. 499

Office Supreme Court, U. S.
FILED.
DEC 2 1895
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895. No. 91.

THOMAS C. CHAPPELL, *Plaintiff in Error*,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR PLAINTIFF IN ERROR.

THOS. C. CHAPPELL,
Plaintiff in Error and Solicitor in Person.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895. No. 91.

THOMAS C. CHAPPELL, *Plaintiff in Error*,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The Honorable William Windom, Secretary of the Treasury, *ex officio* president of the Light House Board, filed a petition in the District Court of the United States for the District of Maryland, March 21, 1890, (Record, pages 1–2,) Said Court passed an order *nisi* thereon. (Record, pages 2–3.) The plaintiff in error, who was the defendant below, excepted to said order *nisi* and the procedure thereunder, (Record, page 3,) and demurred to said petition, (Record, pages 3–4,) and filed a notice to defendant in error to join in such demurrer. The said Court overruled said exception and the plaintiff in error thereupon took a bill of exceptions to the ruling of the Court. (Record, page 4.) The said Court, also, required the

plaintiff in error to proceed with the argument on demurrer, and overruled said demurrer, no joinder being made therein; and the plaintiff in error, on the 15th day of March, 1890, filed a petition on a writ of error in the Circuit Court for the United States for the District of Maryland, but said Court would not pass any order thereon, either allowing or denying the prayer of said petition. (Record, page 7.) The plaintiff, thereupon, on the 15th day of July, 1890, reserving every manner of advantage and exception whatsoever, filed a petition in the said District Court of the United States, but the said petition has been omitted from the Record sent by the clerk of the lower Court to this Court. While said petitions for said writs of error were still depending unheard and undetermined and not dismissed without any such notice as is prescribed by law ever having been given to the plaintiff in error. On the 28th day of October, 1890, a special "jury of inquest to assess damages" was convened, (Record, page 8,) and an inquest was found (Record, page 11) by said jury, and there is nothing in the Record to warrant the interjection in the Record regarding the evidence submitted to the jury as the Record appears in the lower Court; and the plaintiff in error, thereupon, on November 10, 1890, filed a technical plea to the jurisdiction of said Court, (Record, page 12,) which question goes to the validity of said inquisition.

The plaintiff in error, on November 17, 1890, filed exceptions to the inquisition, (Record, page 13); on the 9th of December, the defendant in error had the same set down for hearing, contrary to law (Record, page 14); the Court overruled said exceptions contrary to law (Record, page 14) on December 18. The disbursing officer under the Light House Board filed a petition to pay the money awarded, into Court (Record, pages 14–15); the lower Court passed an order *nisi* thereon (Record, page 15); on December 27, 1890, the plaintiff in error filed a petition for a writ of error to the United States Circuit Court, and an answer to said petition, showing cause against the order *nisi* on said petition (Record, page 16); the lower Court held said petition for a writ of error, *sub curia*; on December 31, 1890, the said disbursing officer tendered $3,500

to the plaintiff in error, which the said plaintiff in error did not accept (Record, page 18); on February 16th, the said disbursing officer laid $3,500 down on the desk of said plaintiff in error. the said plaintiff in error refused to receive the same, except on the express verbal condition precedent that it was not to affect any of his rights in the premises, and expressly his petitions on writs for error, and refused to receive or give any receipt for said money, except on account (Record, page 20), and upon the express condition that none of the rights of the plaintiff in error were to be thereby affected as aforesaid (Record, page 21); on February 24, 1891, the said Court allowed said writ of error to the Circuit Court of the United States; on December 15, 1891, the plaintiff in error filed a petition for a writ of error direct to Supreme Court of the United States, upon the constitutional questions and the question of jurisdiction involved, under Act of 1891, instead of, to the Circuit Court of the United States, upon these questions, to which said petition was attached an assignment of errors, and at same time filed an affidavit (Record, pages 21–24); and on the same day, December 15, 1891, the said lower Court granted said writ of error to the Supreme Court of the United States, upon said petition.

On January 6th, plaintiff in error furnished the clerk of the Court with an additional assignment of errors to attach to the original writ and citation.

On January 14, 1892, said writ issued and the citation was served, and the record thereupon transmitted to this Court.

ASSIGNMENT OF ERRORS.

1. "Act of Congress 1st, 1888, chap. 728, is unconstitutional, because it provides exclusive jurisdiction in Courts of the United States.

2. "Said Act is void because it is contrary to established law and contains no provision that the United States shall first attempt to agree with the landowner.

3. "Said Act is void because it makes no provision for notice where the laws of the State do not provide any such notice.

4. "The proceedings had herein are void because the lower Court did not comply with the provisions of section 2 of said Act of Congress as to mode of procedure."

ARGUMENT.

This Court will review all the questions in the case. "In cases taken direct to the Supreme Court, where a constitutional question is raised, the Supreme Court reviews all the questions in the cases, not merely the constitutional question."

Foster's Federal Practice, Vol. II, sec. 472.
Ekin vs. United States, 142 United States.
Horner vs. United States, No. 2, 143 U. S. 570.

On page 577 of the last case, Mr. Justice Blatchford, in delivering the opinion of the Court, said:

"We are further of opinion that where an appeal or writ of error is taken direct to this Court, under section 5 of the Act of March 3, 1891, in a case in which the constitutionality of a law of the United States is drawn in question, this Court acquires jurisdiction of the entire case, and of all the questions involved in it, and not merely of the question of the constitutionality of the law of the United States."

The question of the coustitutionality of the Act of Congress under which this proceeding is instituted, arises in Art. 1, sec. 8, clause 17, of the Constitution of the United States, which provides that the United States may exercise exclusive jurisdiction over all places *purchased* by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings." Construing the word purchased to include an estate acquired by purchase and not by descent, and admitting that the United States has a right to exercise the right of eminent domain for the purpose of so acquiring by purchase, still the United States is prohibited by this section of the Constitution taken in connection with the X amendment to the Constitution. "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people," from exercising exclu-

sive jurisdiction over such places until the purchase has actually taken place and been consummated; and, therefore, this Act of Congress which confers exclusive jurisdiction upon the Courts of the United States, before said purchase, violates this constitutional provision.

In Kohl vs. United States, 91 U. S. 367, Mr. Justice Strong, in delivering the opinion of the Court, says, on page 372: "Such consent is needed only, if at all, for the transfer of jurisdiction and the right of exclusive legislation, *after* the land shall have been acquired."

If the United States cannot exercise exclusive legislation and jurisdiction after the places have been purchased, until the consent of the State has been given, how can it be contended that it can exercise such exclusive jurisdiction *before* said purchase when this Court has flatly laid down the contrary rule?

In the case of Pollard's Lessee, *et al.* vs. Hagan, Mr. Justice McKinley, in delivering the opinion of this Court, after citing the 17th clause, section 8, article 1, of the Constitution, says: "Within the District of Columbia, and the other places purchased and used for the purposes above mentioned, the national and municipal government, of every description, are united in the government of the Union. And these are the only cases, within the United States, in which all the powers of government are united in a single government, except in the cases already mentioned, of the temporary territorial governments, and there a local government exists, (3 Howard, section 212, page 223). "And, if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in cases in which it is expressly granted." Idem, page 223.

The State of Maryland by an Act of the General Assembly of Maryland, Acts of 1874, chapter 193, has expressly given

its consent to the condemnation of land for light house purposes. (See Code Pub. Gen. Laws, Vol. II, Art. 96, pages 1434–1439.) by the United States, Section 10, provides: "Jurisdiction is hereby ceded to the United States over such lands as shall be condemned, as aforesaid, for their use for public purposes, *as soon as the same shall be condemned*, under the sanction of the General Assembly of this State, hereinbefore given to said condemnation."

It must be acknowledged that all the powers of the United States originate in the several States; that the States delegated certain rights and reserved certain rights, and that by the X amendment, those not delegated are reserved. One of these rights reserved was the right to prevent the United States from exercising exclusive jurisdiction in any places, except in the District of Columbia, and in such places as the State might consent to being acquired by purchase. If the State does not see fit to consent, it cannot be compelled to do so; if it sees fit to consent that jurisdiction shall be transferred "as soon as the same shall be condemned," that is not a consent to such jurisdiction before said condemnation, and the State cannot be compelled to consent, except on its own terms.

The mode of procedure prescribed by the law of the State and the Act of Congress itself, has not been followed; a special jury of inquest has been convened, a statutory jury of inquiry. In the case of Kohl et al. vs. United States, 91 U. S. 367, this Court laid down the rule, that a condemnation proceeding is an action at common law. Being an action at common law, the plaintiff in error is entitled to a trial by a common law jury, and he has not been afforded that trial. A special jury of inquest of damages is a body of men in the nature of commissioners, misnamed a jury. They cannot exercise any of the powers of a common law jury.

The result of this distinction between a special body of assessors of damages, by whatever name they may be called, a jury, commissioners or assessors, and a jury at common law is this, that on appeal from the action of said commissioners or

special jury, the party is entitled to a trial *de novo* by a common law jury before the appellate tribunal.

Stewart vs. Mayor and City Council of Baltimore, 7 Md. 500. See 511-514.

The result of this reasoning is that the plaintiff in error is entitled to such a trial before the appellate tribunal, under the decision of Stewart vs. Mayor and City Council of Baltimore, *supra*, by jury.

According to the rule laid down in 9th G. & J. 511, the appellate tribunal tries the case *de novo*, the laws of the States being the rule of decision in the courts of the United States, except where repugnant to the Constitution of the United States, this plaintiff in error is entitled to a trial by jury in this Court, of the questions of fact raised in the record, according to the course of the common law under the VII amendment to the Constitution of the United States.

This is the result of conferring jurisdiction upon the courts of the United States in this proceeding, which is held in Kohl vs. United States, 91 U. S. 367, by this Court, to be an action at common law.

"These cases fully establish the principle that where a law secures a trial by jury upon an appeal, it is no violation of a constitutional provision for guarding that right, although such law may provide for a primary trial without the intervention of a jury. This is upon the ground that the party, if he thinks proper, can have his case decided by a jury before it is finally settled."

Stewart vs. Mayor and City Council of Baltimore, 7 Md., *supra*.

"The modes in which this power is exercised, vary according to circumstances. Sometimes it is initiated by summoning a jury upon warrant, in the nature of on inquest *ad quod damnum*; at others, boards of assessors are appointed to appraise dues and benefits; with the right of appeal to a Court of Record, *and* of review by a jury." (19 Md. 351. See page 354.)

In the case of Cruger vs. The Hudson River R. R. Co., 12 N. Y., it was held that the word "jury" had been used in a number of statutes to describe a body of men who are in fact commissioners or assessors.

12 New York, 197–200.

The plaintiff in error being entitled to a trial by a common law jury, under Article VII of the Constitution of the United States, has not been afforded that right, because he was not brought into the lower Court according to the course of the common law.

Abbott's United States Practice, Vol. II, sec. 191, page 29.

Code Pub. Gen. Laws of Md., Vol. II, Art. 25, sec. 129.

Where there are several assignments of error, some of which involve the jurisdiction of the Court below, and others do not, the Circuit Court of Appeals may take jurisdiction by writ of error or appeal of the whole case.

McLish vs. Repp, 141 U. S. 661.

"The Evarts Act provides that in appeal, whether by writ of error or otherwise shall hereafter be taken or allowed from any District Court to the existing Circuit Courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing Circuit Courts."

Foster's Federal Practice, Vol. II, page 1015.

This Court has the same jurisdiction in this cause as Court of Appeals in case of McLish vs. Repp, *supra*, it may consider the case on its merits as well as on the question of jurisdiction.

The case of Tidewater Canal Company vs. Archer, 9 G. & J. 479, demonstrates beyond the possibility of a doubt that a statutory jury of view is not a common law jury, (see pages 488–514), and also lays down the rule beyond peradventure that the party is entitled to have a trial before the appellate tribunal by a common law jury, and to try the case *de novo*.

"The familiar case of an appeal from the judgment of a Justice of the Peace to a county Court, will sufficiently illustrate this doctrine, and we here rest it by saying that there is this reason, as it seems to us, in this objection of the Canal Company, and that if it had not in all cases of inquisitions, taken under these statutes, been the practice of the Courts to proceed *de novo*, the grounds upon which this objection is placed would call for such a course under the circumstances of this case." (Idem, page 515.)

SUMMARY.

This Act of Congress is either unconstitutional because it confers exclusive jurisdiction upon the Courts of the United States *before* purchase, whereas the Constitution provides no such exclusive jurisdiction shall attach until *after* purchase, in places such as that at bar.

If constitutional, the plaintiff in error is entitled to a trial at common law, according to modes of procedure prescribed by the law of the land. If the proceedings in the lower Court are valid they are open to review in this Court, according to the course of the common law, and the plaintiff in error is entitled to try the cause *de novo* in this Court, on its merits, either with the aid of a jury or without it, according to the course of the common law.

Wherefore the plaintiff in error, prays that the judgment of the lower Court in overruling his preliminary exception, whereby he claimed the right to a trial by the course of the common law, reserving all question as to the jurisdiction, and the ruling of the lower Court in overruling his demurrer in which he raised the question of the constitutionality of the Act of Congress, and the question of jurisdiction, and the action of the lower Court in proceeding with the trial before a jury of inquiry, and the action of the lower Court in overruling his exceptions to the inquisition may be re-examined, and the said rulings reversed, or the said plaintiff in error afforded a trial "*de novo*" in this Court, according to the course of the common law.

THOS. C. CHAPPELL,
Plaintiff in Error and Solicitor in Person.

Office Supreme Court U. S.
FILED.
DEC 12 1895
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895. No. 91.

THOMAS C. CHAPPELL, *Plaintiff in Error*,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

THOS. C. CHAPPELL,
Plaintiff in Error and Solicitor in Person.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895. No. 91.

THOMAS C. CHAPPELL, *Plaintiff in Error*,

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case was docketed No. 372 for the October Term of 1894. The record was not printed until the Spring of 1895. The case was not reached, and was continued under the rule and docketed No. 91 for the October Term, 1895. The plaintiff in error received a printed copy of the record on November 16th, 1895, which he compared with the record in the lower Court on November 27th, 1895, and on the same day prepared a motion for a writ of *certiorari* and filed the same in this Court on December 2d before the assembling of the Court, as provided by

rule 6 of this Court, said motion being verified, and showing reasons for delay, as provided by rule 14. The case was in the assignment for Monday, December 2d, 1895, and said day being *motion* day, the plaintiff in error called said motion for a writ of *certiorari* up in open Court, and the Court took said motion *sub curia* and directed the plaintiff in error to distribute printed copies of his papers, and the plaintiff in error directed the clerk to print and distribute the said motion, together with a supplemental brief on said motion.

On December 4th, the plaintiff in error, prior to the assembling of the Court, filed in writing, in accordance with rule 6, the following motion, and called the same up in open Court:

In the Supreme Court of the United States.

THOMAS C. CHAPPELL,
Plaintiff in Error,
vs.
THE UNITED STATES.

To the Honorable, the Chief Justice and the Associate Justices of said Court:

And now comes Thomas C. Chappell and says, that he is entitled to an appeal or writ of error under the practice prescribed by the law of Maryland from any final determination of the lower Court; and that the action of the Court after the order or judgment, from which an appeal or writ of error is taken, is no part of the record; and that he is entitled to said writ of error from the order of the Court passed May 12th, 1890; and that his petition for writ of error filed July 15th, 1890, ought to be in the record; and that the clerk of the lower Court is the agent

of the opposite party, the United States, and this plaintiff in error ought not to be predujiced by any act of said opposite party or its agent, in withholding from the record sent to this Court, the petition for writ of error filed July 15th, 1890; and, therefore, the writ of *certiorari* ought to issue, and this case ought to be stayed pending the same; and without making any waiver, the plaintiff in error asks the privilege of filing an additional brief, and says: No brief has yet been filed by the Solicitor-General or the Attorney-General of the United States herein.

Signed,

THOMAS C. CHAPPELL,

Plaintiff in Error and Solicitor in Person.

Which said motion the Court granted, and the plaintiff in error files this additional brief on the motion for a writ of *certiorari*, taken *sub curia* by the Court on December 2, 1895, as aforesaid.

ARGUMENT.

The case is before the Court only on the motion for a writ of *certiorari*, submitted December 2, 1895, and taken *sub curia* by the Court, and is adjourned pending said writ, otherwise the case goes to the foot of the docket, under section 1st, rule 26, of the Court. The plaintiff in error has in no way submitted the case on its merits.

"The Court on the second day of each term will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereafter provided), and if the parties, or either of them, shall be ready when the case is called, the same will be heard; *and* if *neither* party shall be ready to proceed in the argument the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall beshown to the court."

The United States was not ready to proceed, not having filed a printed brief; the plaintiff in error did not wish to proceed because of the defect in the record.

"An application made within a reasonable time after the Record is printed will usually be granted, and pending such a writ the hearing of the cause is usually adjourned."

Morgan vs. Curtenenuis, 19 Howard, 8.

The United States was not ready, and the plaintiff in error did not wish to proceed.

Beir vs. Heath, 142 U. S. 704.

This Court can not, on the application for a writ of *certiorari*, for a diminution of a record which is in this Court on a writ of error or appeal, go into the questions of jurisdiction or the construction and application of the Constitution in such a case, which are to be determined upon a hearing of the case on the writ of error or appeal, and not on the application for the writ of *certiorari*. This case is *entirely different;* is not in the position of the case *In re* Baiz, 135 U. S., 403., or of the case *ex parte*, Hitz, 111 U. S. 766. In these cases the application was for a writ to bring the proceedings of the lower Court before this tribunal by the writ, instead of by appeal or writ of error; but in the case at bar the question is in this Court upon a writ of error upon demurrer, and other pleadings upon the record, involving the construction and application of the Constitution of the United States, the constitutionality of several laws of the United States and the question of a State law being in contravention of the Constitution and Laws of the United States.

The United States itself is a party to the cause, so that the case arises in Article III, Section 2 of the Constitution; it will hardly require any argument to show that this Court has jurisdiction to issue a writ *certiorari* for a diminution of the Record on a writ of error in a case which arises in the Constitution itself, and upon this application

the Court cannot go into the questions properly to be determined upon the hearing of the writ of error.

Without making any waiver, the plaintiff in error desires to call the attention of the Court to the fact that the question of jurisdiction in this case arises in the application of the constitution itself and the want of jurisdiction in the lower Court to conduct the condemnation proceeding, because of the unconstitutionality of the law under which it is instituted, and for further reasons to be shown, on argument of the question upon the writ of error when it is before the Court for argument. That no bill of exceptions is necessary to bring up the judgment of the lower Court. (122 U. S. 469. 141 U. S. 616, Mr. Justice Harlan.) Nor, where there is a demurrer in the Record. That no certification of the question of jurisdiction is required in a case involving the construction or application of the Constitution of the United States, the constitutionality of any law of the United States, or the question of a law of the State being in contravention of the Constitution of the United States.

The plaintiff in error further desires to call the attention of the Court to the fact, that on December 31, 1887, he instituted a proceeding against the United States, in the Circuit Court for the District of Maryland, for the use and occupation by the United States of a strip of his land, upwards of nine thousand feet in length and sixty feet in width, from the 14th day of August, 1889, in which he claimed upwards of nine thousand dollars for said use and occupation, which is still depending in said Court. The following is a copy of the docket entries on said cause:

THE UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, *to wit:*

In Circuit Court U. S.

Thomas C. Chappell *vs.* The United States of America. } 31 Dec., 1887, petition filed. Two certified copies sent; one for District Atty. and 1 for Atty. General U. S. 3 Jany. 1887, affid't of service of copies petition filed. 27 February, 1887, app. of Marshall & Hall, Esq. stricken out, order filed. Same day, app. of F. P. Stevens, Esq., order filed; same day, mo. and leave to amend petition, and amended description plat filed. Same, demurrer to petition argued and held *sub curia.* 19 April, 1888, demurrer overruled, opinion filed. 20 April, 1888, answer of U. S. filed. 26 Dec., 1889, Rep. filed.

I, James W. Chew, clerk of the Circuit Court of the United States for the Fourth Circuit, on and for the Maryland District, do hereby certify that the aforegoing is a true copy of the docket entries in above entitled case.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court, this 10 day of December, A. D. 1895.

(SEAL.)

JAS. W. CHEW, *Clerk,*
Circt. Ct. U. S.

That he is entitled to compensation for said use and occupation since the 14th day of August, 1884.
Chappell vs. U. S., 34 Fed. Rep. 673).

That his title to said lands is admitted by the United States:

"The law will imply a promise to make the required compensation where property, to which the government asserts no title is taken pursuant to an act of Congress, as

private property to be applied for a public use. Such an application being consistent with the constitutional duty of the government as well as with common justice; the claimant's cause of action is one that arises out of implied contract, under the meaning of the statute which confers jurisdiction upon the Court of Claims, in action founded upon any contract, express or implied, with the government of the United States."

U. S. vs. Great Falls Mfg. Co., 112 U. S., Mr. Justice Harlan.

That he has filed a petition in this Court for a writ of *certiorari* with a certified copy of the declaration filed in said case and the docket entries therein, so that it may more fully appear to this Court, that the United States is largely indebted to said plaintiff, in sums for use and occupation, over and above the sum received by him on account, all of which will more fully appear upon a hearing on the writ of error in this cause, as well as upon the petition for a writ of *certiorari* to bring up to this Court the proceedings instituted under the Act of Forty-ninth Congress, 1887.

That this court may try this case on a *venire facias de novo.*

Art. III, sec. 2, of the Constitution, provides: "In all other cases before mentioned the Supreme Court shall have appellate jurisdiction both *as to law and fact.*"

VII Amendment provides: "And no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."

See cases—Tide Water Canal Co. vs. Archer, 9th Gill & Johnson, 473, see p. 515.

United States vs. Sawyer, 7 Gallison Reports, 86, Story, J.

The authorities cited in brief previously filed show that this case being in this Court on a constitutional question,

the Court will take jurisdiction of the whole case. "In cases taken directly to the Supreme Court, where a constitutional question is raised, the Supreme Court reviews all the questions in the case, not merely the constitutional question."

Foster's Fed. Prac. Vol. II, p. 965.

Section 689 R. S. U. S.: "The trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury."

The United States being a party to the cause, the case cannot be dismissed for want of jurisdiction on the hearing on writ of error.

THOS. C. CHAPPELL,
Plaintiff in Error and Solicitor in Person.

Office Supreme Court U. S.
FILED.
DEC 3 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895

No. 91.

THOMAS C. CHAPPELL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

SUPPLEMENTAL BRIEF ON MOTION FOR THE PLAINTIFF IN ERROR.

The plaintiff in error submits the following authorities to show his right to trial *de novo*, from which it will more fully appear that if the lower court had jurisdiction and the same was correctly exercised, that then this cause in this Court on the question of fact as to the inadequacy of the damages awarded, and, according to the practice of common law, the 13th and 24th sections of the judiciary act, and the practice of the State of Maryland, is to be tried herein *de novo*.

Abbot's U. S. Prac., vol. I, 303, 304:

"A writ of error removes for examination nothing but the law, but on reversing a judgment on a writ of error the

circuit court has power to award a new trial, to be had, if justice requires it, in the circuit court."

Case cited: 1 Gall., 86.

Poe, P. and P., vol. II, sec. 771:

Exceptions to inquisition:

"Upon the hearing of the exceptions the court does not sit merely as an appellate tribunal, to pass only upon questions raised and determined upon the inquisition, but proceeds to hear the whole case *de novo* and will give such decision as the testimony introduced before it may warrant, even although the verdict of the jury upon the testimony laid before them may have been correct."

Case cited: Tide Water Canal Co. *vs.* Archer, 9 G. and A., 479.

In the case of United States *vs.* Sawyer, 1 Gall., 86, the question was raised whether the circuit court of the United States for the first district could, sitting as a court of error, issue a *venire facias de novo* to try an issue of fact upon a reversal.

After citing various English authorities, the court says: "But the doctrine does not rest on these adjudications, well founded as they are. In Grant *vs.* Astle, in error from the common pleas, the court, on solemn consideration, awarded a new venire and said that there was no doubt that it might be awarded by a court of error and was not a new practice, and that upon inquiry a great many cases had been found. The same doctrine had been uniformly recognized and adhered to by the King's Bench ever since that time, and Davies *vs.* Pierce, 2 T. R., 125, is very strong authority to show the right, even upon error, to a court sitting within another jurisdiction.

In the State of New York the practice invariably obtains, and it has been deliberately adopted by the supreme court of Massachusetts. I take the doctrine, therefore, to be incontrovertibly established, that at common law a court of

error has a perfect jurisdiction to issue a *venire facias de novo* whenever upon the record justice requires it.

I should not, indeed, have deemed it necessary to have examined this point so much at large (for at the argument I entertained no doubt on it) but for the abandonment of it on the part of the United States, and it is certainly matter of surprise that a doctrine so fully settled by authority should have been yielded without an effort.

But this authority does not, as to the circuit court of the United States, depend altogether upon the common law, but it is expressly given by statute. By the act of 24th, 1789, sec. 24, it is provided "that where a judgment or decree shall be reversed in a circuit court, such court shall proceed to *render such judgment* or pass such decree as the district court should have passed, and the supreme court shall do the same on reversal therein, *except* where the reversal is in favor of the plaintiff or petitioner in the original suit and the damages to be assessed or matter to be decreed are uncertain, in which case they shall remand the cause for a final decision.

If this court therefore are to render the judgment that the district court ought to have rendered, then the judgment must be that the first and second pleas be adjudged bad and the third plea be tried by a jury, and in admiralty causes from that court the revisory power has always been exercised by appeal, which, according to well-established principles, removes the cause for a hearing *de novo*, as well as to facts as to law; and in common-law causes this court can well try a cause at its own bar, as they have a jury for trials.

I am, therefore, of the opinion that the issue of fact, which was omitted to be tried in the court below, should be tried by a jury at the bar of this Court. As the district judge concurs in this opinion, let the judgment be reversed and a trial be ordered at the bar of this court. (See pages 99–103, Story, J.)

THOMAS C. CHAPPELL,
Plaintiff in Error and Solicitor, in Person.

Office Supreme Court U. S.
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In the Supreme Court of the United States.

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THOMAS C. CHAPPELL, APPELLANT,
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THOMAS C. CHAPPELL, APPELLANT,
v.
THE UNITED STATES. } No. 91.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR THE UNITED STATES.

THE PETITION FOR CERTIORARI.

This petition was first presented to the court December 2, 1895, the day before the case was called for trial. It was not printed until December 3, the day of trial. The petition is wholly without merit.

1. It does not comply in any sense with rule 14 of the Supreme Court, which provides that "all motions for certiorari must be made at the first term of the entry

of the case; otherwise, the same will not be granted, unless upon special cause shown to the court *accounting satisfactorily for the delay.*"

The case was filed in this court February 27, 1892, and thus there was a delay of three years and nine months. The record has been printed more than a year and the cause was docketed No. 372 for the October term, 1894, as is shown by the record.

The only special cause for the delay shown is on page 2 of the petition, as follows:

> And the said petitioner shows for cause for delay in filing this petition that, owing to the statements of the clerk of the lower court in December and to press of business and other litigation, he has not examined until to-day the said record of said district court in connection with the purported copy thereof sent to this court, and that at the time the plaintiff in error filed his petition for writ of error to this court on December 15, 1891, he insisted he had filed said previous petition in the district court, but the clerk said he had only filed a petition in the circuit court, and made your petitioner so believe, said clerk being the deputy clerk who prepared said record.

It is insisted that, in view of the time that the case has been here and that the record has been printed, the excuse is wholly insufficient.

2. The part of the record which is sought to be brought up is a petition for a writ of error filed in the district court to the circuit court on July 15, 1890. (Petition, p. 1.) The petition for certiorari shows that this petition for writ of error was filed after the overruling of a demurrer, and before the final disposition of the cause.

The contention is that the mere filing of the petition *ipso facto* took the case out of the district court. While this is not true, the record shows that after the said date, to wit, on the 28th day of October, 1890, the case went to trial, and that evidence was adduced in behalf of plaintiff in error (Rec., p. 8), and there is nothing to show that there was any objection to going into trial on account of this petition pending.

If the petition for writ of error were brought into this case, it could do the plaintiff in error no possible good, for the case could not be reversed on account of it, under the circumstances above stated. Besides, the record shows that long after that petition was filed and after the trial plaintiff in error filed his petition for a writ of error to this court, assigning grounds of error, and makes no complaint that any error was committed in respect of the former petition, which he says was filed on the 15th day of July, 1890. (Rec., pp. 20, 21, 22.)

II.

BRIEF FOR PLAINTIFF IN ERROR.

The brief for appellant, filed in this cause December 2, 1895, does not rely on any of the errors assigned on pages 22 and 23 of the record. Those errors are the only ones that are properly before the court. The brief (p. 3) states that on January 6 plaintiff in error furnished the clerk of the district court with an additional assignment of errors to attach to the original writ and citation. No such assignment was attached, and no such assignments appear in the record.

Supreme Court rule 35 prescribes that "the plaintiff in error or appellant shall file with the clerk of the court below, *with his petition for the writ of error or appeal*, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. * * * Such assignment of errors shall form part of the transcript of the record and be printed with it. * * * And *errors not assigned according to this rule* will be disregarded; but the court, at its option, may notice a plain error not assigned."

In this case the petition was presented and the writ of error allowed on the 15th day of December, 1891. The brief states that the additional assignments were filed with the clerk on January 6. The rule was not complied with, for it distinctly states that the assignments shall be filed with the petition, and that errors not so assigned will be disregarded.

The brief states (p. 3) that the writ issued and citation was served on January 14, 1892. The time of the issuance of the writ and citation have nothing to do with the question. After the petition was filed and the writ of error was allowed, upon errors assigned it was too late to file an additional assignment.

The assignments do not point out such plain errors that the court of its own motion will notice them. It is insisted that they point out no errors at all.

The assignments are as follows:

> 1. Act of Congress, 1st, 1888, chapter 728, is unconstitutional, because it provides exclusive jurisdiction in courts of the United States.

> 2. Said act is void because it is contrary to established law and contains no provision that the United States shall first attempt to agree with the landowner.
>
> 3. Said act is void because it makes no provision for notice where the laws of the State do not provide any such notice.
>
> 4. The proceedings had herein are void because the lower court did not comply with the provisions of section 2 of said act of Congress as to mode of procedure. (Brief of plaintiff in error, pp. 3, 4.)

It is sought to sustain this by the argument that the United States may not exercise exclusive jurisdiction over any territory within a State until the purchase of the ground has actually taken place and is consummated. The act of 1888 does not purport to confer any jurisdiction over any land in the sense in which the case of *Kohl* v. *United States* (91 U. S., 367), cited in the brief on page 5, refers to jurisdiction, but simply gives the court jurisdiction to condemn land.

The right to condemn may exist and the right to confer jurisdiction upon the court may exist without affecting the question whether or not thereafter the United States shall have exclusive jurisdiction over the property so acquired so as to exclude the operation within it of State laws. The questions have nothing to do with each other. The brief says:

> If the United States can not exercise exclusive legislation and jurisdiction after the places have been purchased, until the consent of the State has been given, how can it be contended that it can exercise such exclusive jurisdiction *before* said purchase when this court has flatly laid down the contrary rule? (p. 5.)

It is a sufficient answer to this to say that the United States may acquire, through its right of eminent domain, property for public purposes, such as arsenals and light-houses, and that it may do this without choosing to exclude the jurisdiction of the State within the territory.

If the contention in the brief were sound, then the United States could not exercise the right of eminent domain and acquire property for public purposes without the consent of a State.

The case of *Pollard's Lessee* v. *Hagan* (3 How., 223) is cited to sustain the contention that the United States has not the right to take land within the limits of a State by eminent domain except in cases in which the State has given its consent. The question of eminent domain was not before the court in that case, and what was said was a mere dictum.

The rule is now settled that the United States have the right to condemn private lands lying within a State for the purpose of carrying out any express right conferred by the Constitution, with or without the consent of the State. (*Luxton* v. *North River Bridge Co.*, 153 U. S., 525.)

Since this is the law, it is immaterial whether (as stated on p. 5 of the brief) the State of Maryland has consented, and such consent, coupled with conditions, can not impose any limitations upon the rights of the United States.

It is insisted in the brief that the mode of procedure prescribed by the law of the State has not been followed (p. 6), and that it secures the right of trial by jury, with a right, upon appeal, to a trial by another jury in the

court of appeals. If the power of the United States to exercise the right of eminent domain were dependent upon any condition imposed by the State of Maryland in giving its consent this argument might avail.

Inasmuch as the United States derive the right under the Constitution, they are only bound to give such a trial as the Constitution itself guarantees. The second trial before a jury in the court of appeals can not be imposed by any State law.

While the United States *nisi prius* courts, in trials at law, must pursue as near as may be rules of procedure which prevail within the several States at the time, it is manifest that this can only apply to a trial in the court of first instance, and that this doctrine has no application to the trial of an appeal before this court.

It is insisted that the jury was composed of a body of men "in the nature of commissioners," and that for this reason the right of jury trial was denied. The record shows that "a jury was duly impaneled in said cause, in accordance with the order of court passed therein, and sworn 'to truly and impartially value and assess the damages for the condemnation of the said easement over the land at Hawkins Point in said petition mentioned, and true inquisition make according to the evidence.'" (Rec., p. 8.)

No exception was taken at any time to the character of the jury or the manner of impaneling it, and this question is made for the first time in this court, and upon an assignment of errors which do not, to the ordinary mind, give the remotest intimation that such a point would be made.

The plaintiff in error seems to be perfectly content to waive all the errors of the lower court, provided this court will try the case *de novo* with a jury. While this latter alternative would not be strenuously opposed, if the court have the power and disposition to so order, it is respectfully suggested that this course can not be adopted, for the reason that there was no error made by the court below.

The *Act of 1789, section 13* (1 Stat., p. 80), carried into the Revised Statutes as section 689, which provides for a trial by jury in this court was, it is insisted, not intended to apply to cases on appeal.

There have been but two jury trials in this court, and they were *original* cases—that of *State of Georgia* v. *Brailsford*, in 1794, reported in 3 Dall., 1, and *Oswald* v. *State of New York*, in 1795.

While it is insisted that no assignments are presented by the brief of plaintiff in error which can be looked to, nevertheless, inasmuch as the court reserves to itself the right to examine the record for errors, and inasmuch as there are assignments of error in the record which are not referred to in the brief, a presentation of the case will be made for the purpose of showing that it contains no merits whatever, and that there could be no possible injustice in affirming it.

III.

STATEMENT.

This was a proceeding begun March 21, 1890, in the United States district court for the district of Maryland,

upon the petition of William Windom, Secretary of the Treasury of the United States, and *ex officio* president of the Light-House Board of the United States, for the purpose of condemning an easement across a strip of land situated in the State of Maryland.

Proceedings were taken under section 4658 of the Revised Statutes, which is as follows:

> The Light-House Board shall be attached to the office of the Secretary of the Treasury, and under his superintendence shall discharge all administrative duties relating to the construction, illumination, inspection, and superintendence of light-houses, light vessels, beacons, buoys, sea marks, and their appendages, and embracing the security of foundations of works already existing, procuring illuminating and other apparatus, supplies, and materials (*fo*) of all kinds for building, and for rebuilding when necessary, and keeping in good repair the light-houses, light vessels, beacons, and buoys of the United States; and shall have the charge and custody of all the archives, books, documents, drawings, models, returns, apparatus, and other things appertaining to the light-house establishment.

The United States had constructed and in operation range lights and two beacon lights situated within the State of Maryland, and it was necessary to transmit from these light-houses, both by day and night, rays of light across a fast strip of land so that navigators might see them, and for this purpose the condemnation proceedings were begun.

The land over which the easement is sought to be condemned is described in the petition, and the name of the owner, Thomas C. Chappell, was set out. (Rec., p. 1, 2.)

The court made an *ex parte* order, directing a copy of the petition and the order to be served on the said Chappell, on the 24th day of March, A. D. 1889, and this was done. (Rec., pp. 2, 3.)

On April 9, 1890, Chappell appeared and excepted to the aforesaid order of the court, but no ground of exception is set out in the record. (Rec., p. 3.)

On the same day, and without it appearing that any previous action had been taken upon the exception, he filed his demurrer, setting out that the petition was not sufficient in law for the action of condemnation to be maintained against the defendant, and he was not bound to answer the same; that there was no authority of law for the proceeding; that it was not shown that Congress had or would appropriate more than $5,000 to pay for said easement; that there is no party plaintiff made in the petition; that the statute of Maryland required such a proceeding to take place in the county where the land was situated; that there was no law authorizing the Attorney-General of the United States, or any other person, to institute such a proceeding; that the United States could not be made a party to said suit except by direction and with the consent of the law making power, and that the same had not been given; that the *locus in quo* was not sufficiently described; that the petition was different in substance and form from that required by established precedents in like cases.

The demurrer also *alleged* that the property exceeded in value $5,000. (Rec., pp. 3, 4.)

Notice was given by plaintiff to the United States district attorney to "join in the demurrer."

On May 12, 1890, the court overruled the demurrer, and provided in the order as follows:

> And the said proceeding shall be in such form as that the United States of America and the said Thomas C. Chappell shall be the parties thereto. (Rec., pp. 5, 6.)

There was no special appearance for the purpose alone of objecting to the jurisdiction, and the demurrer went to the merits.

On May 15, 1890, defendant Chappell filed a petition for writ of error to the circuit court, and the same is "inserted in record at request of defendant."

No action appears to have been taken upon the same. (Rec., pp. 7, 8.)

Thereafter, on October 28, 1890, "after due notice to the parties hereto," a jury was duly impaneled to try the issues, and evidence was introduced *in behalf of both parties*. (Rec., p. 8.)

The jury assessed the damages at the sum of $3,500. (Rec., p. 12.)

On November 10, after the jury had assessed the damages, and while the case was in that attitude, Chappell filed a plea in abatement to the jurisdiction of the court, on the ground that the court ought not to take cognizance of the action because "the cause of action aforesaid, if any accrued to the said plaintiff, accrued to him at Annapolis, within the jurisdiction of the circuit court for Anne Arundel County, State of Maryland, and not within the jurisdiction of this court." (Rec., p. 12.)

On November 17, 1890, Chappell filed exceptions to the inquisition.

These exceptions were overruled, and the inquisition and award were confirmed. (Rec., p. 14.)

On December 27, 1890, Chappell filed a petition praying for a writ of error to the United States circuit court for the Maryland district, and it was allowed by the judge. (Rec., pp. 16, 17.)

The record shows that on February 16, 1891, the $3,500 was paid to Chappell, being the full amount of the award. (Rec., p. 19.)

Chappell states in an affidavit "that the said payment of said money was in no way to effect said right of appeal or writ of error, and your petitioner receipted for the said ($3,500) thirty-five hundred dollars on account." (Rec., p. 20.)

On December 15, 1891, Chappell filed his petition for a writ of error to the Supreme Court, and the same day it was allowed. (Rec., pp. 21, 22.)

POINTS AND ARGUMENT.

I.

The petition of plaintiff in error is special and only seeks to bring the cause here "under the act of Congress and the joint resolution of 1891" * * * "in order that said rulings, judgments, and orders may be reviewed and reexamined by the Supreme Court of the United States *upon the question of jurisdiction* raised in said pleas and demurrers and the other papers on file in this cause." (Rec., p. 22.)

There is no certificate from the judge of any character certifying any question of jurisdiction to this court.

This is fatal to the maintenance of the writ of error in this case. (*Maynard* v. *Hecht*, 151 U. S., 324, 328.)

The case being brought here only "upon the question of jurisdiction raised in said pleas and demurrers and other papers on file in this cause," all other questions in the case except those of jurisdiction are eliminated.

The objection to want of jurisdiction goes to the power of the court over the parties and the subject-matter and has nothing to do with the regularity of procedure.

The only question of jurisdiction raised is that the suit should have been brought in a court of the county where the land is situated and that the United States district court had no jurisdiction.

The State of Maryland is one judicial district, and the United States district court had jurisdiction for this purpose over all of the land in the State.

It is expressly conferred by 25 Stat., chap. 728 (p. 357).

II.

The writ of error should be dismissed, because the record shows there is no controversy now existing.

After the award, and while the cause was pending in the lower court, and before the petition for writ of error was filed, plaintiff in error received from the disbursing officer under the Light-House Board of the Treasury of the United States at Baltimore the full amount of the award. (Rec., pp. 18, 19.)

Plaintiff in error undertakes to show in his affidavit (p. 20) that at the time of receiving said money he "reserved all right of appeal or writ of error."

to except to the order of this honorable court passed the twenty-first day of March, A. D. 1890, in the matter aforesaid. (Rec., p. 3.)

No ground for excepting is set out. The trial judge should not be put in error upon such a general objection. The order excepted to appears on page 2 of the record. The action taken was to direct a copy of the petition to be served on the defendant, and that he show cause by a day fixed why the prayer of the petitioner should not be granted.

This was certainly not reversible error. Whether it constituted proper process is an entirely different question. The exception does not raise the latter point, but asserts that the action of the court in making the order was erroneous. This may be granted, and yet it would not affect the case. If it were intended to constitute this a leading process in the case, and such action were erroneous, then objection should have been taken, by special appearance, to the summons by a motion to quash.

No such point was raised, but a general exception to the order of the court was filed.

But it does not appear that the court acted on the exception. The record is silent. It does appear that on the same day, viz, April 9, that the exception was filed, and apparently without waiting for the court to act upon it, the defendant filed a demurrer, and on the same day gave notice to the counsel for petitioner to join in the demurrer. (Rec., pp. 3, 5.) This demurrer was not special and to the jurisdiction alone, but went to the merits of the entire case.

The filing of such a demurrer before any action of the court on the exception was a waiver of the exception.

III.

The ruling of the court allowing the case to proceed to trial without a writ of summons being issued and served, and without any notice by publication being given, whereas the court should have required said writ or said notice, as provided by the laws of the State of Maryland and the Constitution of the United States. (Rec., p. 22.)

As shown above, the defendant voluntarily appeared and without objecting to the absence of or defect in process filed a demurrer, which went to the merits of the entire case.

Appearance by a defendant, answering and participating in the trial of a suit in a State in which he does not reside, and in which he had not been served with process, waives nonservice of process. (*Fitzgerald and M. Constr. Co.* v. *Fitzgerald*, 137 U. S., 98.)

If the court order one to be made a party to a suit and he voluntarily appears and files an answer he can not object that no process was served on him. (*Henderson* v. *Carbondale Coal and C. Co.*, 140 U. S., 25.)

The same effect follows from filing a demurrer, which goes to the merits, and it constitutes a general appearance. (*St. Louis and S. F. R. Co.* v. *McBride*, 141 U. S., 127.)

The filing of such a demurrer is a general and voluntary appearance and submission to the jurisdiction, and cures defects in or absence of process.

The demurrer filed does not raise the question of defect or nonservice of process. If such question of

In his petition he undertakes to treat it as a loan from the Government, with the land as security. (Rec., p. 21.)

It is insisted that no "verbal notice" could overcome the act of receiving the award. No disbursing officer of the United States had any right to agree to any transaction which changed the legal effect of payment. The affidavit of the officer does not show any such agreement. He says: "I went to his office and paid him the sum of $3,500 lawful money of the United States, being the full amount of the award for the easement aforesaid mentioned in said proceedings." (Rec., p. 19.)

No receipt showing any modification of this statement is exhibited. If plaintiff in error had such a receipt he should have produced it.

If the petitioner had been an ordinary litigant the parties to the record might have made an agreement doing away with the accord and satisfaction which the receipt of the award would work, but the disbursing officer had no such authority to bind the Government. He was only authorized to pay, and the receipt of the money by plaintiff in error, who was charged with a knowledge of the authority of such officer, operated as a satisfaction and no conditions could be imposed by him which could overcome the effect of his acceptance of the money from one who was only charged with the duty of payment and had no power to control the litigation.

Such acceptance cures all errors. If the case should be reversed the court would have no power to order the repayment of the money and the Government would be remitted to a suit to recover it, and would have no remedy

in case of insolvency. It appearing to the court that there is now no controversy, the cause should be dismissed. (*Cheong Ah Moy* v. *United States*, 113 U. S., 216; *San Mateo County* v. *Southern Pacific Railroad Company*, 116 U. S., 138; *Little* v. *Bowers*, 134 U. S., 547, 558; *Singer Mfg. Co.* v. *Wright*, 141 U. S., 696; *California* v. *San Pablo, etc., Railroad*, 149 U. S., 308, 314.)

ASSIGNMENT OF ERRORS.

I.

> To the order of the court granting the prayer of the petition of William Windom, Secretary of the Treasury, whereas the court should have denied said prayer. (Rec., p. 22.)

This is too general and does not set out particularly the error asserted and intended to be urged, as is required by Rule 35. It goes to the prayer of the petition and the relief granted, and necessarily embodies every possible error involved in the entire proceedings.

II.

> The ruling of the court in overruling the exception of Thomas C. Chappell to the order of the court passed twenty-first day of March, in the year of our Lord one thousand eight hundred and ninety, whereas the court should have sustained said exception. (Rec., p. 22.)

The exception is as follows:

> And now comes said Thomas C. Chappell *in propria persona*, who, saving and reserving all advantages and exceptions whatsoever, prays leave

> to except to the order of this honorable court passed the twenty-first day of March, A. D. 1890, in the matter aforesaid. (Rec., p. 3.)

No ground for excepting is set out. The trial judge should not be put in error upon such a general objection. The order excepted to appears on page 2 of the record. The action taken was to direct a copy of the petition to be served on the defendant, and that he show cause by a day fixed why the prayer of the petitioner should not be granted.

This was certainly not reversible error. Whether it constituted proper process is an entirely different question. The exception does not raise the latter point, but asserts that the action of the court in making the order was erroneous. This may be granted, and yet it would not affect the case. If it were intended to constitute this a leading process in the case, and such action were erroneous, then objection should have been taken, by special appearance, to the summons by a motion to quash.

No such point was raised, but a general exception to the order of the court was filed.

But it does not appear that the court acted on the exception. The record is silent. It does appear that on the same day, viz, April 9, that the exception was filed, and apparently without waiting for the court to act upon it, the defendant filed a demurrer, and on the same day gave notice to the counsel for petitioner to join in the demurrer. (Rec., pp. 3, 5.) This demurrer was not special and to the jurisdiction alone, but went to the merits of the entire case.

The filing of such a demurrer before any action of the court on the exception was a waiver of the exception.

III.

> The ruling of the court allowing the case to proceed to trial without a writ of summons being issued and served, and without any notice by publication being given, whereas the court should have required said writ or said notice, as provided by the laws of the State of Maryland and the Constitution of the United States. (Rec., p. 22.)

As shown above, the defendant voluntarily appeared and without objecting to the absence of or defect in process filed a demurrer, which went to the merits of the entire case.

Appearance by a defendant, answering and participating in the trial of a suit in a State in which he does not reside, and in which he had not been served with process, waives nonservice of process. (*Fitzgerald and M. Constr. Co.* v. *Fitzgerald*, 137 U. S., 98.)

If the court order one to be made a party to a suit and he voluntarily appears and files an answer he can not object that no process was served on him. (*Henderson* v. *Carbondale Coal and C. Co.*, 140 U. S., 25.)

The same effect follows from filing a demurrer, which goes to the merits, and it constitutes a general appearance. (*St. Louis and S. F. R. Co.* v. *McBride*, 141 U. S., 127.)

The filing of such a demurrer is a general and voluntary appearance and submission to the jurisdiction, and cures defects in or absence of process.

The demurrer filed does not raise the question of defect or nonservice of process. If such question of

jurisdiction had been raised, in connection with other defenses going to the merits, it would have been thereby waived.

In *St. Louis and S. F. Railway Co.* v. *McBride* (141 U. S., 130), Mr. Justice Brewer said:

> Assuming that service of process was made, although the record contains no evidence thereof, and that the defendant did not voluntarily appear, its first appearance was not to raise the question of jurisdiction alone, but also that of the merits of the case. Its demurrer, as appears, was based on three grounds: Two referring to the question of jurisdiction, and the third, that the complaint did not state facts sufficient to constitute a cause of action. There was therefore, in the first instance, a general appearance to the merits. If the case was one of which the court could take jurisdiction, such an appearance waives not only all defects in the service but all special privileges of the defendant in respect to the particular court in which the action is brought.

IV.

> The ruling of the court in overruling the demurrer of Thomas C. Chappell, whereas the court should have sustained said demurrer. (Rec., p. 22).

There are eight distinct grounds of demurrer. (Rec., p. 4.)

This assignment is too general. It should particularly set forth the error asserted and intended to be urged (Rule 35). It is submitted, however, that none of the reasons set forth in the demurrer are sound, and they will be discussed in their order.

First. There is no authority of law for this proceeding. (Rec., p. 4.) This covers a wide field, and may raise the question of power in the United States Government to condemn the property, of authority conferred by Congress to condemn, and of authority to bring this particular suit.

A. The right of the United States to condemn land for such a purpose is clear.

> So the United States, at the discretion of Congress, may acquire and hold real property in any State whenever such property is needed for the use of the Government in the execution of any of its powers, whether for arsenals, fortifications, light-houses, custom-houses, court-houses, barracks, or hospitals, or for any other of the many public purposes for which such property is used; and when the property can not be acquired by voluntary agreement with the owners it may be taken against their will by the United States in the exercise of the power of eminent domain upon making just compensation, with or without a concurrent act of the State in which the land is situated. (*Van Brocklin* v. *State of Tennessee*, 117 U. S., 151, 154; *Luxton* v. *North River Bridge Co.*, 153 U. S., 525, 529.)

B. Full authority was given by Congress to condemn the land in question.

By section 4658, Revised Statutes, the Light-House Board, under the superintendence of the Secretary of the Treasury, is charged with all administrative duties relating to the construction and maintenance of light-houses.

By section 4660 this Board "is authorized, whenever an appropriation has been or may be made by Congress

for a new light-house, the proper site for which does not belong to the United States, to purchase the necessary land, provided the purchase money be paid from the amount appropriated for such light-house."

The limitation upon the power of purchase is to protect the United States. The plain purpose is to prevent fixing a liability against the Government beyond what Congress has appropriated. The limitation upon the right to contract for the purchase of land is a result from the inhibition against obligating the Government in advance of an appropriation. The restraint is not aimed against acquiring land, but against creating a debt. Where funds are available the reason for the limitation does not exist, and it would be a narrow construction of the power of the Board, and one which, with our rapidly increasing commerce and long intervals between the sessions of Congress, would seriously cripple the Board in extending the efficiency of the light-house system, to hold that, although it has the money and the power to expend it, nevertheless it may not purchase land unless there shall have been a specific appropriation for that purpose.

The petition alleges and the demurrer admits that there is an appropriation available for paying for this easement, and that it is necessary for the Government to acquire said easement for the effective use of the Hawkins Point and Leading Point lights. (Rec., pp. 1, 2.)

Congress understood that the limitation on the power of the Board went only to the question of incurring debt, and it expressly recognized that it had acted within its

authority in this case, for the Congress which was in session when these proceedings began appropriated for—

> Hawkins Point Light Station, Maryland: For legal services in condemning the easement between Hawkins Point Light and Leading Point Light, Patapsco River, Maryland, one thousand dollars. (26 Stat., 955.)

This was an express ratification of the action of the Board in this case.

If there was a power to purchase, there was a power to condemn. (25 Stat., 357.)

C. Want of authority of an attorney to bring a suit can not be raised by demurrer. The presumption is in his favor, and his right to appear can not be legally questioned until facts or circumstances are shown by affidavit or otherwise sufficient to justify a rule against him to show his authority. (Weeks on Attorneys at Law, sec. 195.)

Where a suit has been instituted in the name of a State by its attorney-general, the court will presume in favor of his authority in the absence of proof. (*State of Pennsylvania* v. *The Wheeling, etc., Bridge Co.*, 13 How., 560.)

Second. It is not shown that the Congress of the United States has appropriated or will appropriate more than $5,000 to pay for said easement, and said easement is of a value greatly exceeding $5,000. (Rec., p. 4.)

This is a speaking demurrer and avers that the value of the land exceeds $5,000.

The ground of objection is, not that no appropriation has been made, but that a particular sum has not been appropriated. If there were anything in the general ques-

tion of prior appropriation this does not raise it, as it is confined to a particular arbitrary sum set up in the demurrer.

Third. It is not shown whether Congress annually or has ever appropriated a sum of money for repairs and incidental expenses of the light-house sufficient to pay for said easement, which is applicable therefor. (Rec., p. 4.)

The petition does so allege and the demurrer admits it.

These last two grounds appear quite immaterial in the light of the facts that the jury only valued the easement at $3,500, and the full amount has been paid to the plaintiff in error.

Fourth. There is no party plaintiff made in the petition. (Rec., p. 4.)

The petition was filed in the name of William Windom, Secretary of the Treasury of the United States and *ex officio* president of the Light-House Board of the United States. (Rec., p. 1.)

The court was of the opinion that this objection was well taken, and in his order disposing of the demurrer provided that "the said proceeding shall be in such form as that the United States of America and the said Thomas C. Chappell shall be the parties thereto." (Rec., p. 6.)

This operated as an amendment, and no exception was taken thereto.

Mr. Chappell filed subsequent pleadings and executed his appeal bond, and the cause is here under the style of *The United States* v. *Thomas C. Chappell*. (Rec., pp. 12, 13, 23.).

Fifth. The laws of Maryland require said proceeding to be conducted in the circuit court for the county where

said land is situated, and by the laws of the United States the said laws of the State form the rule of decision in the courts of the United States in this matter. (Rec., p. 4.)

If this means that the suit could only be brought in the State court, and that the effect of adopting State practice is to oust the United States courts of jurisdiction, then the proposition has at least the merit of novelty.

This question, however, is settled by 25 Statutes, page 357 (ch. 728), which is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemdation, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Treasury under this act, or such other officer, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.
>
> SEC. 2. The practice, pleadings, forms, and modes of proceeding in causes arising under the provisions of this act shall conform as near as may be to the practice, pleadings, forms, and proceedings existing

> at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.

Sixth. The United States have passed no general or special law authorizing the petitioner or the Attorney-General of the United States, or any other person whatsoever, to institute this proceeding, and said proceeding is instituted *ultra vires*, and the said United States can not be made a party to said suit except by the direction and with the consent of the lawmaking power, and said power has neither directed the same nor consented thereto. (Rec., p. 4.)

Passing by the latter clause, which volunteers information that a demurrer is not competent to give, a reference to the statute last cited shows that in cases like this it is made the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, to cause condemnation proceedings to be commenced. The petition shows on its face that it was filed by the direction of the Attorney-General of the United States. (Rec., p. 2.)

Seventh. The *locus in quo* is not sufficiently described in the petition. (Rec., p. 4.)

The description is as follows:

> An easement and perpetual guaranty against obstruction of the Brewerton Channel, Patapsco River, range lights, known as Leading Point and Hawkins Point lights, across a strip of fast land, a part of Hawkins Point proper, the said strip of land to be 30 feet on either side of the line of the

said range lights and to extend from the ordinary high-water mark on the east side of Thomas Cove, Patapsco River, along said range and across Hawkins Point proper, and to the ordinary high-water mark of the Patapsco River west of Hawkins Point light-house, being a total length of 113 perches, or 1,864.5 feet, more or less. The direction of center line of said strip of land from Hawkins Point light to Leading Point light, according to the Coast Survey chart of 1886, is north 64 degrees 30 minutes west. (Rec., p. 2.)

If it be not a good description of the land actually meant to be covered, there is nothing on the face of the petition to show it, and so a demurrer would not reach it.

It is not on its face void as an incomplete description, or so indefinite as to fail to designate any land. It describes some land, and that is sufficient on a demurrer.

Eighth. The petition is different in substance from the usual approved and established precedents in like cases.

The petition alleges the need of the land by the sovereign for public purposes, designating them, describes the land and its location, gives the name and residence of the owner, and prays for condemnation. The demurrer does not point out in what respect it is defective.

V.

The ruling of the court in overruling the exceptions of Thomas C. Chappell to the inquisition, whereas the court should have sustained said exception. (Rec., p. 23.)

The exception to the inquisition is as follows:

> And now comes Thomas C. Chappell and makes the following exception to the inquisition found in this cause:
>
> First. That the statute under which this proceeding is sought to be maintained is unconstitutional, and this court has no jurisdiction of the subject-matter of this suit.
>
> Second. That the lawmaking power of the United States has not authorized any officer to make said United States a party to this suit or proceeding, and this court has no jurisdiction of the subject-matter of this suit, there being a want of power to condemn this property described in this inquisition.
>
> Third. That the laws of the United States have not been complied with.
>
> Fourth. That the damages allowed are inadequate.
>
> Fifth. That the easement is not properly described in the inquisition.
>
> Wherefore the said inquisition ought to be set aside and vacated. (Rec., p. 13.)

The first, second, and third grounds are substantially raised by the demurrer and are above treated.

The fourth ground can not be assigned as error here. There is no bill of exceptions. If the evidence were set out in the record the question of valuation would not be reviewed here.

The fifth ground was covered by the demurrer and ~~are~~ treated above.

J. M. DICKINSON,
Assistant Attorney-General.